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ANSWER TO PETITION FOR CERTIORARI

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CASES

STATUTES

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 148 Misc.

GILBERT E. THIEL,
Petitioner,

vs.

SOUTHERN PACIFIC COMPANY, a corporation,
Respondent.

ANSWER TO PETITION FOR CERTIORARI

I.

PRELIMINARY STATEMENT[1]

1. Nature of Petitioner's Action.

Petitioner, a salesman,[2] his wife and a male companion, Johnny Morris, spent Sunday, February 18, 1940, to Sunday evening, February 25, 1940, in Reno, Nevada. During

1. Parenthetic numerals refer to the record.

2. The complaint alleges petitioner "was 28 years of age • • • and was employed as a salesman" (4).

that week, but not after noon of Saturday, the 24th, petitioner drank and gambled. He was sober at the time of the accident of this action. About 8:40 p.m., Sunday, the 25th, his wife, Morris and he, boarded Train No. 9 at Reno, for San Francisco. They sat in the second day-coach. The train left Reno about 8:50 p.m.

After the train left Reno, while it was in motion, petitioner, Morris and a passenger, Rippetoe, left the second coach and went forward to the smoker. In the smoker petitioner and Morris sat together, petitioner next to the window, Morris toward the aisle. Rippetoe took the seat just ahead. About 25 minutes out of Reno, the conductor came through the smoker, lifting tickets. The conductor had passed Thiel and Morris, a step or two, when petitioner, without warning, suddenly opened the window and jumped out, so fast that it was impossible for Rippetoe, Morris and the conductor to stop him.[3] They tried. Petitioner was hurt. This was all **in Nevada.**[4]

Petitioner had no connection with respondent except that of a passenger. His complaint shows that the cause of his injury was his own act.

2. Earlier Proceedings in the Case.

This action was commenced in the California Superior Court for San Francisco, on December 30, 1940. Respondent removed the action into the United States District

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3. The complaint alleges that "while said train was in motion" appellant "suddenly opened the window of said train and leaping out" was injured (2, 3).

4. Between Verdi and the California line, in the Truckee River Canyon (1164, 1165).

Court for the Northern District of California[5] and answered. It set up appropriate defenses by denial and affirmative statement[6] (6-11 and see 251-253).

An unsuccessful attack on the District Court's jurisdiction (see note 5) was followed by an attack on the jury panel which was overruled. The case then went to trial before Judge Bowen, sitting in the Northern District of California, in November 1942 and resulted in a verdict and judgment for the defendant. Motions for judgment *n.o.v.* and for a new trial were denied. On appeal the judgment was affirmed (149 F.2d 783). This Court granted certiorari "limited to the question whether petitioner's motion to strike the jury panel was properly denied" (326 U.S. 716, 90 L.ed. 423) and reversed the judgment, May 20, 1946 (328 U.S. 217, 90 L.ed. 1181).

On the going-down of the mandate the case was again set down for trial upon the same pleadings before the court and a jury from the July 1946 Term panel (147-237; 39).

The case went to trial before a jury on September 10, 1946 (272) and ended on September 24, 1946 with a verdict for the defendant (1028; 96) on which judgment was en-

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5. Petitioner twice moved to remand to the state court. His motions were denied. On respondent's petition attempts to proceed in the state court, in defiance of the orders of the District Court denying his motions, were enjoined. On appeal the decree was affirmed. (*Thiel v. Southern Pacific Company*, 126 F.2d 710 (C.C.A 9, 1942, certiorari denied 316 U.S. 698, 86 L.ed. 1767.)) This settled the jurisdiction of the court below.

6. The answer (6, 11) admitted petitioner "had been" drinking (not that he was drunk), that he "suddenly opened the window" and leaped out and denied all charges of negligence. Other defenses set up petitioner's own negligence, recklessness, wilful- and wanton conduct, specifically setting up that his injuries were due to his own "independent, voluntary and wilful act."

tered (97). The evidence, except as respondent offered new evidence that petitioner's injury was the result of his own voluntary, thoughtful and designed conduct, was the same as on the first trial. Motions for judgment *n.o.v.* and for a new trial (99-115) were denied (116). On appeal the judgment was affirmed (169 F.2d 30,—C.C.A. 9). This petition followed.

II.

THE SUFFICIENCY OF THE EVIDENCE TO SUSTAIN THE VERDICT AND JUDGMENT IS NO LONGER AN OPEN QUESTION

The evidence on the second trial was substantially the same as on the first trial, except that in some respects it strengthened the conclusion that the plaintiff was in possession of his normal faculties, was fully oriented, knew and appreciated where he was, fully appreciated the consequences of his own conduct and deliberately jumped from the train in an attempt to destroy himself.[7] The meaning and effect of the evidence has been passed on ten times, always with the same conclusion,—twice by juries, twice by courts as matter of fact[8] in denying mo-

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7. Testimony and evidence by interrogatories and documents was exactly the same and the testimony of 4 witnesses, Wilcox, the express messenger, conductor Cosgrove, Dr. Bernard, and Carl Smith, investigator for the California Motor Vehicle Department, was exactly the same because given by reading their testimony on the first trial.

Witnesses who were not called at the first trial were engineer Tassi, called by the plaintiff, and the ambulance driver Laity and deputy sheriff Parks, called by the defendant, to whom petitioner said he had attempted to commit suicide. (This, of course, was not the language he used.)

8. *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 85 L.ed. 147; *Capitol Traction Co. v. Hof*, 174 U.S. 1, 43 L.ed. 873; *Kelly v. Jackson*, 6 Pet. 622, 632, 8 L.ed. 523, 527; *Zeller's Lessee v. Eckert*, 4 How. 289, 298, 11 L.ed. 979, 983; *Schuchardt v. Allen*, 6 Wall. 359, 17 L.ed. 642, 646; *Felton v. Spiro*, 78 F. 576, 583

tions for new trial, by two trial courts as matter of law in denying petitioner's motions for directed verdicts and for judgment *n.o.v.*, and twice by the Circuit Court of Appeals for the Ninth Circuit. On each appeal it was argued, as it is now argued, that the evidence was insufficient to sustain the verdicts for the defendant. In addition the same point was made to this court in the petition for certiorari to review the judgment of the Circuit Court of Appeals for the Ninth Circuit affirming the judgment on the first verdict for the defendant. This Court declined to consider the contention and in granting the petition limited its writ to the question whether the motion to strike the jury panel was properly denied. (See p. 3 above.)

The technique used in attempting to present the matter is not unfamiliar. Disregarding the rule that the verdict has resolved all conflicts in favor of the respondent, and that all inferences favorable to respondent (the party successful below) are to be indulged, it distorts the evidence by selecting only those parts of it thought to help petitioner. There is no occasion here to review the testimony at length. For convenience we summarize it (as it was summarized in our Brief in the Court below) in Appendix A hereto. It has not been suggested that this statement is inaccurate or that there are improper omissions.

The burden of petitioner's claim is that as a result of heavy drinking he was under a mental disability, that respondent had notice of his condition, and accepted him

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(C.C.A. 6); *Reid v. Md. Casualty Co.*, 63 F.2d 10, 12 (C.C.A. 5); *Aetna etc. Co. v. Yeatts*, 122 F.2d 350 (C.C.A. 4); *Gen. etc. Co. v. Cent. Nat. B'k*, 139 F.2d 821, 823 (C.C.A. 8).

as a passenger and negligently failed to guard him, stop the train promptly and render first aid.

The short answers are that the best that can be said for petitioner is that the following were questions of fact to be resolved by the jury:

1. In fact was petitioner under any disability? There is evidence that he was not.

2. Asuming that petitioner was under any disability, did respondent have any notice of a disability calling for action on its part? There was evidence that it did not.

3. Assuming that petitioner was under some sort of disability and that respondent had noticed that he was under some sort of disability, was there any negligence on its part in failing to take special steps to care for him in view of the fact that he was accompanied by attendants, apparently fully capable of taking care of him, who could do as much as any attendant that respondent could provide, and in view of the fact that if respondent had notice of any disability it was of such character that it could not reasonably be anticipated that respondent would do any harm to himself? There was evidence that there was no negligence.

4. In view of the fact that petitioner went out the window so fast that three men who were within arm's reach could not stop him could the providing of an attendant have done more? Was assumed failure to provide an attendant a proximate cause of any injury? There was evidence that an additional attendant could have done no more and his absence was not a cause of any injury.

5. Was there any negligence on the part of respondent after petitioner jumped out the window, in failing

to stop the train sooner? The evidence was that the stop signal was given immediately and was immediately acted upon. There was evidence that there was no negligence. While the conductor was endeavoring to hold the petitioner by his coat, others in the coach, including a brakeman who was riding to the rear of the smoker, immediately gave the stop signal.

6. Was there any negligent failure to render first aid? There was evidence that there was not and that nothing that was done or was not done contributed to or aggravated any condition from which petitioner was suffering as a result of his own rash act.

III.

CLAIMED ERROR IN DENIAL OF THE MOTION TO PRODUCE

Granting a motion to produce documents obtained by the adversary in preparation for trial is, if proper at all, at most discretionary. Nothing has been suggested to show an abuse of discretion here. This case had been fully tried once. Counsel for the plaintiff knew the defense he would meet. He had ample opportunity to learn what, if any, proper documents existed. His demand was first made at the pre-trial conference before the second trial. Full objection was made that the foundation had not been laid;[9] that there would be no objection to things which were normal matters of record, but objection would be made to an attempt to obtain the defendant's preparation for trial. Plaintiff's attorney then stated that he was "not asking for anything which they obtained by means

9. "There is no showing in any form that there are any such reports in existence" (262).

of investigation or otherwise" (262, 263). Defendant's attorney asked that he "designate for us with particularity" what was required "so I can identify them" (263). When, later, the motion was renewed, the documents claimed to exist were specified and identified by affidavit on "information and belief" only.

This affidavit does not state the basis of affiant's "information and belief." Then it undertakes to specify with extreme particularity the documents claimed to exist. As to each it is said that it was made "in the usual course of business, shortly after said accident." It then specifies for each of nine named persons, a purported statement. For each there is a claimed specific description. For example it is said that the report from engineer Tassi was one in which he stated "that he received only one stop signal"; that Clark's report was that "he saw plaintiff hanging on the window of said train"; that brakeman Sherman's report was that he observed plaintiff "and saw that he looked abnormal"; that Wogan's report was that he was told "that plaintiff was acting crazy, but he made no investigation," etc. In each instance the reference was to a specific paper claimed to exist.

This motion and affidavit were met by a counter-affidavit (70). The counter-affidavit flatly stated of each paper specified that "there is no such report or any report in existence made 'in the usual course of business shortly after said accident'" (here following exactly the language of the affidavit offered in suport of the motion) as distinguished from material obtained for the purpose of defending litigation. But the counter-affidavit did not stop here and expressly continued, "and that there is no such

report of any kind in existence as that specified." The trial court "in the light of all the circumstances surrounding the motion and the affidavits of the parties on file herein" found "the plaintiff has not shown good cause" and denied the motion.

IV.

THE CALIFORNIA FIRST AID KIT LAW HAD NO APPLICATION

It is claimed the Court should have instructed on the California First Aid Kit Law. There were several short answers.

As matter of fact, there is no evidence that any failure to have any first aid kit caused amputation of plaintiff's legs or in any way contributed to any condition from which he suffered (see Appendix A, p. 23).

As matter of law the California statute had no application and could not have been violated. The accident happened in Nevada. "Liability for a tort depends upon the law of the place of the injury." (*Young v. Masci,* 289 U.S. 253, 258, 77 L.ed. 1158, 1161; *W. W. Clyde & Co. v. Dyers,* 126 F.2d 719 (C.C.A. 10—cert. den. 317 U.S. 638, 87 L.ed. 514); *Loranger v. Nadeau,* 215 Cal. 362, 366, 10 Pac.2d 63; *Restatement, Conflict of Laws,* §§377-388; 3 *Beale, Conflict of Laws,* §§378.2, 378.4, 379.1, 383.1, 384.1). Nevada law governs substantive rights and duties and the California statute had no application. Even if it had applied the instructions proposed were improper. They ignored §4 of the statute. There was no attempt to show the facts necessary as conditions precedent to a claim of violation of the statute.

V.

THERE WAS NO IRREGULARITY IN PREPARING THE JURY PANEL, PETITIONER IS NOT IN POSITION TO RAISE THE QUESTION AND THE PURE QUESTION OF FACT PRESENTED ON THIS RECORD DOES NOT WARRANT REVIEW.

The petition misses the significance of the holding in *Thiel v. Southern Pacific Company*, 328 U.S. 17, 90 L.ed. 1181. The contentions now made with respect to the preparation of the jury panel were made when the judgment on the first verdict for the defendant was reviewed by this Court, and were rejected.

When this case was before this Court one of the grounds of attack on the jury panel was that there was no proper apportionment of jurors by districts. Attention was called to the applicable statute (Jud. Cod. §277, 28 U.S.C.A. §413) and it was pointed out at some length the part of the district from which jurors were drawn, the consistent practice approved by the Court and the reason, i.e., to select names from the area for which there were commuting facilities to and from San Francisco. (See Respondent's Brief in *Thiel v. Southern Pacific Company*, October Term, 1945, No. 349, pp. 9, 16, 17.) Petitioner's contention was rejected *sub silentio*. The repetition of the contention here calls for no further notice. The record here demonstrates that the practice is the same as that which was before the court when it reviewed the first judgment, and was expressly approved by the order of the District Court for the drawing of this very panel (see below, pp. 12, 13).

The main contention now made, although expressed in different words, was made when the case was here before.

The Court noticed (328 U.S. at 219, 90 L.ed. at 1184), the claim that "mostly business executives or those having the employer's viewpoint are purposely selected on said panel, thus giving a majority representation to one class or occupation and discriminating against other occupations and classes, particularly the employees and those in the poorer classes." This broad claim was not sustained by this Court. The Court did not deal with proportions or percentages at all. The holding was not on the ground that any practice resulted in a panel composed mostly of "business executives or those having the employer's viewpoint" but on the narrow ground that the panel was improperly constructed because one particular type of wage earner, the wage earner receiving daily wages, was purposely and intentionally excluded. This was all the case held. It was recognized that not "every jury must contain representatives of all the economic, social, religious, racial, political and geographical groups of the community; frequently such complete representation would be impossible." All that was required was "that prospective jurors shall be selected by court officials without systematic and intentional exclusion" of any of these groups. "The choice of the means by which unlawful distinctions and discriminations are to be avoided rests largely in the sound discretion of the trial courts and their officers." The difficulty was that "both the Clerk of the Court and the Jury Commissioner testified that they deliberately and intentionally excluded from the jury list all persons who worked for a daily wage." This exclusion of a class, deliberately and intentionally, was held to be improper. "Jury competence is an individual rather than

a group or class matter." It was further pointed out that "the admitted discrimination was limited to those who worked for a daily wage." This discrimination having now been removed, as clearly appears from the testimony now here, the only discrimination pointed to by the Court no longer exists. (See Appendix B)

The short of the holding is that of all the matters raised and urged the only point upon which the decision was rested was that "a blanket exclusion of all daily wage earners" was improper. This was the vice this Court found. This has been corrected (see the Clerk's testimony, 220 l. 3 et seq.; and the Commissioner's testimony, 201 l. 22). In this respect there has been a change in the method (202 l. 7-14).

Although there is an attempt to disclaim it, the real burden of the petition is an endeavor to maintain the proposition that there was not proportional representation of classes on the panel. The record will not sustain even this claim. We shall return to it. But first there is a preliminary proposition. The petitioner is not entitled to raise the point. As a preliminary, it is first necessary to state some steps in the case after the decision of this court and before the second verdict was returned.

Thiel v. Southern Pacific Company, 328 U.S. 217, 90 L.ed. 1181 was decided May 20, 1946. On June 6, 1946, the matter being regularly noticed on the District Court's Calendar, published in The Recorder[10] (234:10-235:15) the

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10. The calendars of the District Court for the Northern District of California, Southern Division, were and are regularly published Monday through Friday of each week in The Recorder, a paper of general circulation, published in San Francisco. On District Judge Goodman's Calendar in The Recorder for Thursday morning, June 6, 1946, there appeared for 4 o'clock P.M.

jury panel for the July, 1946, Term was publicly drawn in open court before District Judges Goodman and Roche.[11] The Court first examined the Clerk (154-160) and Jury Commissioner (160, 161) on how the names in the box had been selected and found that the names had been selected properly. It then made its order that from the names in the box 80 be drawn for possible grand jurors and 300 for possible trial jurors for the July, 1946, Term. This was done (161:19-162:11).

Petitioner, as his case approached trial, noticed a motion to strike the entire July, 1946, Term panel (30), the motion was heard August 19, 1946 (147-237), the proceedings of June 6, 1946, were made part of the record (154-162), testimony was taken and the motion was denied. The Court's opinion contains findings (147-237; 39; 67 F. Supp. 934).

The case went to trial September 10, 1946, and on that day a jury, selected from the July, 1946, Term panel, was empaneled (272-279). With the constitutional 12, the Court selected an alternate juror (360-369).[12]

1. Petitioner Waived Any Claim That the Jury Panel Was Not Properly Constituted.

On the morning of the 6th day of the trial, Wednesday, September 18, 1946, in chambers, the Court told counsel

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"In re selection of Master Jury Trial List—1946—July term of Court" (234:10-22). The statement of the attorney for the plaintiff that there was nothing in The Recorder (162:18) was in error.

11. The proceedings (154-162) were made part of the hearing on petitioner's motion to strike the jury panel.

12. The information obtained as to the jurors, the only information in the record as to any of the individuals on the panel, is summarized in Appendix C.

for the parties that two jurors, Albert N. Wilmes and Miss Zola Taylor were unable to appear because of illness. In open court counsel agreed that they were satisfied that these jurors were ill. By stipulation the alternate juror, Mrs. Troupe (365), took Miss Taylor's place. The Court then stated that this made 11 jurors in the box and asked if counsel were willing to make a stipulation.[13] Counsel for petitioner then stated:

> "Yes, your Honor, plaintiff is willing to stipulate that the trial may proceed **with the 11 jurors** and the verdict of **the** 11 jurors may have the same full force and effect as if returned by 12 jurors."[14]

He added that the stipulation was entered into under Rule 48.[15] Respondent joined in the stipulation and both parties announced they were ready to proceed (725-728).

For the protection of litigants rules have developed regulating the structure of courts (juries included) and judicial proceedings. Some are sufficiently important to be guaranteed by the Constitution. Two are the right to trial by jury and to be represented by counsel. Yet these rights, though constitutional, are so far personal to the litigant that he can waive them. (*Adams v. U. S.*, 317

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13. The stipulation had been agreed upon at the conference in chambers (1209:21-25).

14. Petitioner stipulated because he was satisfied with the jury he had and thought it would give him a verdict. He thought that for him it was a fair jury (see 1219:2-22). (Cf. *Carruthers v. Reed*, 102 F.2d 933, 938, col. 1 (C.C.A. 8, cert. den. 307 U.S. 643, 83 L.ed. 1523.)) Having had his chance and lost he is not now entitled to say it was not "because we were discussing the thing informally in chambers" (1219:22). Cf. pp. 18, 19 below.

15. "The parties may stipulate that the jury shall consist of any number less than twelve * * *."

U.S. 269, 275, 87 L.ed. 268, 272;[16] *Hawk v. Olson*, 326 U.S. 271, 279, 90 L.ed. 61, 67; *Wood v. Howard*, 157 F.2d 807 (C.C.A. 7,—cert. den. 331 U.S. 814, 91 L.ed. 1832; *People v. Nakis*, 184 Cal. 105, 111, 193 P. 92.[17] Cf. *Breese v. U. S.*, 226 U.S. 1, 11, 57 L.ed. 97, 102.[18])

Within this rule claimed defects in the construction of a jury panel can be waived. Grounds of challenge to the array (or for motion to strike or to quash the panel) can be waived and are, in fact, waived if the objection is not made in time (*Francis v. Southern Pacific Company*, U.S. ...., 92 L.ed. (Adv. Op. 610, 614))[19] or is not made

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16. The court said: "This brings us to the merits. They are controlled in principle by *Patton v. United States*, 281 U.S. 276, 74 L.ed. 854, 50 S.Ct. 253, 70 A.L.R. 263 and *Johnson v. Zerbst*, 304 U.S. 458, 82 L.ed. 1461, 58 S.Ct. 1019. The short of the matter is that an accused, in the exercise of a free and intelligent choice, and with the considered approval of the court, may waive trial by jury, and so likewise may he competently and intelligently waive his Constitutional right to assistance of counsel. • • • The relation of trial by jury to civil rights—especially in criminal cases—is fully revealed by the history which gave rise to the provisions of the Constitution which guarantee that right. Article 3, Sec. 2, Para. 3; Sixth Amendment; Seventh Amendment. That history is succinctly summarized in the Declaration of Independence in which complaint was made that the Colonies were deprived 'in many cases, of the benefits of Trial by Jury.' But procedural devices rooted in experience were written into the Bill of Rights not as abstract rubrics in an elegant code but in order to assure fairness and justice before any person could be deprived of 'life, liberty or property.'"

17. The sheriff, the officer designated to summon juries, was disqualified. The court, improperly, instead of designating the coroner designated an elisor who summoned the jury. Held, that the objection was waived.

18. Waiver of the claim that the grand jury was not present when the foreman presented an indictment.

19. "Petitioners contend that the jury panel from which the jury in this case was selected was drawn contrary to *Thiel v. Southern P. Co.*, 328 U.S. 217, 90 L.ed. 1181, 66 S. Ct. 984, 166 A.L.R. 1412. We do not stop to inquire into the merits of the

in sufficiently precise form.[20] (*U. S. v. Gale*, 109 U.S. 65, 77, 27 L.ed. 857, 858;[21] *Agnew v. U. S.*, 165 U.S. 36, 41 L.ed. 624;[22] *Powers v. U. S.*, 223 U.S. 303, 312, 56 L.ed. 448, 452;[23] *Hyde v. U. S.*, 225 U.S. 347, 373, 56 L.ed. 1114, 1128;[24] *Turner v. U. S.*, 66 Fed. 280, 285 (C.C.A. 5); *Haussener v. U. S.*, 4 F.2d 884, 887 (C.C.A. 8);[25] *McNichol v. U. S.*, 9 F.2d 623 (C.C.A. 6);[26] *U. S. v. Meyer*, 113 F.2d 387, 396 (C.C.A. 7,—cert. den. 311 U.S. 706, 85 L.ed. 459)

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claim. The objection was made for the first time in the motion for a new trial. It seems to have been an afterthought, as the *Thiel Case* was decided a few weeks after the verdict of the jury in the present case. If not an afterthought, **it is an effort to retrieve a position that was forsaken when it was decided to take a gamble on the existing jury panel.** In either case the objection comes too late. Cf. *Queenan v. Oklahoma*, 190 U.S. 548, 552, 47 L.ed. 1175, 1178, 23 S. Ct. 762."

In the *Queenan Case*, the claim was of disqualification of an individual juror for conviction of a felony. Proper objection was not made at the time of discovery of the fact. Held, that the defendant "**could not speculate on the chances of getting a verdict and then set up that he had not waived his rights.**"

20. The same rule applies to grounds of challenge to individual jurors. *Kohl v. Lehlbach*, 160 U.S. 293, 302, 40 L.ed. 432, 435; *Strang v. U. S.*, 45 F.2d 1006 (C.C.A. 5, cert. den. 283 U.S. 835, 75 L.ed. 1447) and 53 F.2d 820 (C.C.A. 5, denying writ of error coram nobis).

21. Objection was made that a statute exeluding certain persons from the grand jury was unconstitutional.

22. Claimed that a special venire was improperly returned from part only of the District. Waiver was one of the grounds for rejecting the claim.

23. The claim was that the grand jury was not properly summoned and sworn.

24. The claim was that the jury commissioners improperly delegated their functions to a third person.

25. The challenge was insufficient in form.

26. It was claimed the jurors were "repeaters" and did not come from the body of the district. Beyond this counsel declined to state in what respect the jurors were not properly selected. Held, that any point was waived because of insufficiency of statement of the grounds of challenge.

and cases cited; *Johnson v. Williams,* 244 Ala. 395, 13 So. 2d 687; *People v. McCrea,* 303 Mich. 213, 6 N.W.2d 489, 514; *Johnson v. State,* 143 Tex. Cr. 54, 156 S.W.2d 986; *Gay v. City of Eugene,* 53 Or. 289, 100 Pac. 306.)

The rule of waiver has been applied to a claimed improper inclusion of women on a jury panel (*Zito v. U. S.,* 64 F.2d 772 (C.C.A. 7)),[27] to claimed improper exclusion of women (*Wuichet v. U. S.,* 8 F.2d 561, 562 (C.C.A. 6,—cert. den. 270 U.S. 561, 70 L.ed. 781) and see *Ballard v. U. S.,* 329 U.S. 187, 91 L.ed. 181[28]) to claimed improper exclusion of a class because of race or color (*Bush v. Kentucky,* 107 U.S. 110, 27 L.ed. 354;[29] *Williams v. Mississippi,* 170 U.S. 213, 232, 42 L.ed. 1012, 1016;[30] *Franklin v. South Carolina,* 218 U.S. 161, 167, 54 L.ed. 980, 984;[31] *U. S. v. Brady,* 47 F. Supp. 362,[32] aff'd 133 F.2d 476[33]

27. The claim was based on the circumstance that less than 30 days after sentence the Illinois statute providing for the inclusion of women was declared unconstitutional.

28. This case held that the point had not been waived but the court's discussion makes it clear that the objection that women were improperly excluded could be waived and would be waived by failure appropriately to make the point.

29. Held, that the motion to set aside the petit jury panel was properly overruled "for the reason, among others, that the grounds upon which it was rested do not clearly and distinctly show that the officers who selected and summoned the petit jurors excluded from the panel qualified citizens of African decent because of their race or color."

30. The Court took occasion to notice "that there is nothing direct and definite in this allegation either as to means or time as affecting the proceedings against the accused."

31. "There was no allegation in the motion to quash upon this ground, or offer of proof to show that persons of the African race were excluded because of their race or color * * *." The court notices that it was "essential to aver" as well as prove the fact relied upon.

32. At page 367 the court notices the failure properly to present the point.

33. At page 480 and following the court speaks of the failure properly to present the point as a "waiver." It said that "the

(C.C.A. 4,—cert. den. 319 U.S. 746, 87 L.ed. 1702 reh. den. 319 U.S. 784, 87 L.ed. 1727); *Carruthers v. Reed*, 102 F.2d 933, 937 (C.C.A. 8,—c.d. 307 U.S. 643, 83 L.ed. 1523);[34] *State v. Wilson*, 204 La. 24, 14 So.2d 873, app. dis. 320 U.S. 714, 88 L.ed. 419; *Hicks v. State*, 143 Ark. 158, 220 S.W. 308 c.d. 254 U.S. 630, 65 L.ed. 447; *Washington v. State*, 95 Fla. 289, 116 So. 470 c.d. 278 U.S. 599, 72 L.ed. 528.[35] Cf. *Virginia v. Rives*, 100 U.S. 313, 25 L.ed. 667) and to the rule of *Thiel v. Southern Pacific Company* itself (*Francis v. Southern Pacific Company*, above).

The stipulation to "proceed with the 11 jurors" in the box effectively waived any objection to the panel or the jury petitioner had examined and before whom he had been trying his case for 5 days.[36] (*Bank of Grottoes v. Brown*,

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failure of experienced counsel, for reasons of their own, to offer the necessary proof to support the charge was as deliberate and effective a waiver as if the point had not been made at all. That a defendant, especially when represented by counsel, may make a competent and intelligent waiver of a constitutional right binding upon him is well established by repeated decisions." The point "of racial discrimination was raised so inadequately • • • that in effect it was not raised at all and was therefore waived."

34. After the trial it was claimed that negroes were systematically excluded from grand and petit juries. But the point was not raised because counsel feared to prejudice his case and because he thought he had a good jury. "Where parties, even in a criminal case, knowingly and deliberately adopt a course of procedure which at the time appears to be to their best interest, they can not be permitted at a later time, after a decision has been rendered adverse to them, to obtain a retrial according to procedure which they voluntarily discarded and waived."

35. These three state cases were cases of claimed racial discrimination. Since a constitutional right was involved the procedure as well as the substance presented a federal question and whether the question was properly raised was a federal question. It was so held in *Carter v. Texas*, 177 U.S. 442, 447, 44 L.ed. 839, 841.

36. Compare the related question of consent to trial of a law issue on the equity side (*Williamson v. Chic, etc. Corporation*, 59 F.2d 918, 921 (C.C.A. 8); *Penley Bros. Co. v. Hall*, 84 F.2d 371,

8 F.2d 382 (C.C.A. 4);[37] *Hoagland v. Chestnut Farms Dairy*, 72 F.2d 729 (C.A. for Dist. Col.);[38] cases cited above.) A party cannot agree to go forward with a jury in the box whose composition is known, take his chance that he will get a verdict and then claim he was prejudiced by the jury's composition because the verdict is against him. (*Francis v. Southern Pacific Company*, quoted in note 19; *Queenan v. Oklahoma*, quoted in note 19; *Carruthers v. Reed*, quoted in note 34; *Adams v. U. S.*, above;[39] *Strang v. U. S.*, note 20 above;[40] *Fay*

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373 (C.C.A. 1); *U. S. v. Havner*, 101 F.2d 161, 165 (C.C.A. 8)) and consent to try an equitable issue on the law side (*Mobile Ship Building Co. v. Federal Etc. Co.*, 280 Fed. 292 (C.C.A. 7, cert. den. 260 U.S. 726, 67 L.ed. 483)).

37. It was claimed that the Court improperly excluded from the jury all persons who were directors or stockholders in any bank or renters of safe deposit boxes. Held: Unnecessary to consider the point. After the jury retired it twice reported inability to agree. "Apparently, at that time, neither party wanted to be put to the expense and delay of a new trial and they mutually stipulated to accept a majority verdict. The Bank then knew who were on the jury and the agreement made was clearly a waiver of any objection to the way in which they were originally selected."

38. A juror became sick. This left 10 men and an unmarried woman. On the suggestion that the testimony would be such as to cause her embarrassment the Court announced it would withdraw her and did so over the objection of plaintiff's counsel stating it would either discharge the remaining 10 jurors or proceed with the 10. Counsel for the parties then agreed to proceed with the 10. The Court said: "It is, of course, very clear that the appellant having consented to proceed with the remaining 10 male jurors cannot now complain."

39. The Court said in addition to what is quoted in note 16 above:

> "Simply because a result that was insistently invited, namely, a verdict by a Court without a jury, disappointed the hopes of the accused ought not to be sufficient for rejecting it."

40. "Upon the showing made after verdict, the conclusion is inescapable that appellant was speculating on his chances of being acquitted, intending to rely on the disqualification of the juror

v. New York, 332 U.S. 261, 91 L.ed. 2043;[41] *Riley v. Davis*, 57 Cal. App. 477, 484, 207 P. 699 (hr. by Supreme Ct. den.).[42])

2. The Petit Jury Panel Was Properly Constituted.

Waiver aside, and on the merits, little beyond necessary corrections is needed. The grounds now urged were urged when the case was here before. They were passed without notice. The Court confined itself to the single ground pointed out above.

The petition's gratuitous assertion that the courts below "openly defied" the mandate of this Court and were "defiant or apathetic about complying with this Court's mandate," warrants no comment.

The petition has gone outside the record, industriously. This calls for no comment.

Complaint is made that the jury panel was "hand-picked," and was not selected by a system of lot or chance. The method of selecting names was determined by

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only in the event he was convicted. He could not do this, but must be held to have waived the ground of challenge for cause based on the disqualification of the juror."

41. "It is not easy, and it should not be easy, for defendants to have proceedings set aside and held for naught, on constitutional grounds when they have accepted as satisfactory all of the individual jurors who sat in their case * * *."

42. "Moreover, it is equally plain that if any disqualification existed it was waived by the failure of appellant to make timely objection. * * * He chose, however, to take his chances upon receiving a favorable verdict; and in such cases the just and well-established rule is, that, after the case goes against him, he cannot object to the validity of the verdict because of circumstances within his knowledge which he has declined to seasonably urge. * * * The authorities, indeed, seem to be uniform that a known cause of challenge is waived by holding it until after verdict, 'since such practice is incompatible with good faith and fair dealing which should characterize the administration of justice.'"

Congress. Selection by a system of lot or chance would not respond to the procedure set up. The names for the jury panel for any district court are to be selected "by the Clerk of said Court, or a duly qualified Deputy Clerk and a Commissioner" (Jud. Cod. §276, 28 U.S.C. §412). They are to select persons having "the same qualifications, * * * and be entitled to the same exemptions, as jurors of the highest court of law in" the State where the federal court is sitting (Jud. Cod. §275, 28 U.S.C. §411). The selection of such persons is committed to the discretion of the Clerk and Commissioner (*Thiel v. Southern Pacific Company,* supra; *Glasser v. United States,* 315 U.S. 60, 85, 86 L.ed. 680, 707; *Williams v. Mississippi,* 170 U.S. 213, 42 L.ed. 1012; *Franklin v. South Carolina,* 218 U.S. 161, 168, 54 L.ed. 980, 985; *Akins v. Texas,* 325 U.S. 398, 89 L.ed. 1692; *Thomas v. Texas,* 212 U.S. 278, 53 L.ed. 512). The exercise of judgment is called for. The Clerk and Commissioner must select "citizens" of proper age, possessed of "natural faculties and of ordinary intelligence and not decrepit," who have a "sufficient knowledge of the English language" (Cal. C.C.P. §198). They must avoid persons "convicted of malfeasance in office or any felony or other high crime" (Cal. C.C.P. §199), take only those "of fair character, and approved integrity, and of sound judgment" (Cal. C.C.P. §205), and should avoid persons having any of the numerous California exemptions (Cal. C.C.P. §200, listing 14 classes of exemptions).

The ground principally urged is that there was no proportional representation of classes on the panel. That this is the complaint is disclaimed. But the substance, for all the petition's protest, is the claim of want of proportional

representation of two selected classes, (a) an economic class of persons other than business men and executives and (b) women. These claims were urged when the case was here before. To neither of them did this Court give consideration on a record substantially the same as the record here. It would seem sufficient to refer to those cases holding that there is no right to proportional representation. (*Thiel v. Southern Pacific Company,* above; *Akins v. Texas,* above; *Virginia v. Rives,* 100 U.S. 313, 25 L.ed. 667; *Thomas v. Texas,* above; *Wong Yim v. U. S.,* 118 F.2d 667 (C.C.A. 9, c.d. 313 U.S. 589, 85 L.ed. 1544); *Beckett v. U. S.,* 84 F.2d 713 (C.C.A. 6). Cf. *Fay v. New York,* 332 U.S. 261, 91 L.ed. 2043; *Moore v. New York,* 333 U.S. 565, 92 L.ed. (Adv. Op.) 637.)

But even the claim of want of proportional representation is not made out. The argument is based on a mutilation of the record.

The question for the trial court was one of fact.[43] The question raised by the motion,—more properly a challenge to the array,—was to be tried by the court. Its determination of the fact is entitled to the same respect as any determination of fact by a trial court (Jud. Cod. §287, 28 U.S.C. §424; *Thomas v. Texas,* above; *Akin v. Texas,* above; *Wood v. Brush,* 140 U.S. 278, 285, 35 L.ed. 505, 508; *Jugiro v. Brush,* 140 U.S. 291, 35 L.ed. 510; *Andrews*

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43. The undisputed testimony of the Clerk and Commissioner in the record when the case was here before that they endeavored to exclude all persons working for an hourly or daily wage because of hardship presented pure questions of law whether (a) nonstatutory blanket exclusion of a class could be made and (b) whether anyone other than the court acting on individual cases could exclude for hardship, real or assumed.

v. Swartz, 156 U.S. 272, 39 L.ed. 422; *Gibson v. Mississippi,* 162 U.S. 565, 584, 40 L.ed. 1075, 1079; *Pierre v. Louisiana,* 306 U.S. 354, 83 L.ed. 757). The finding of the fact can be attacked only if there is no evidence to support it. This can fairly be argued only by a review of **all** of the evidence,—not by wrenching from its context a selected portion. (We review the testimony in Appendix B hereto. Compare the opinion of the trial court, Appendix D hereto.) Even the testimony selected has not been fairly quoted.

The petition claims that the testimony shows the Clerk and Commissioner "made a conscious effort to select half of the names included on the original panel from 'executives, proprietors and managers'; that the other half was selected from persons not included in that group" (p. 7); that there was "purposeful handpicking of 50% executives and 50% non-executives" (p. 13); that purposely and arbitrarily there was adopted the system "of selecting 50% of the panel from the class of 'executives or managers of firms or presidents or owners of business.' The remaining 50% was chosen from all others eligible." (p. 14)

This claim is based upon what purports to be a quotation from the testimony of the clerk. **It reverses the effect of his testimony and does this by deliberately omitting part of what he said.** The argument is that the Clerk and Commissioner selected one-half from business men, proprietors and executives and allowed only one-half for all other classes. **This is just the reverse of what the testimony was.** The testimony was that one-half came from working people and the other half was made up of **all other classes,** only one of which was executives or managers or proprietors.

This is what the Clerk testified to, and we put in bold face the portions omitted[44] in undertaking to quote his testimony at page 7 of the petition:

> "I endeavored each time to select approximately half of the proposed jurors from the working class; by that I mean I made no distinction between those working for a daily wage as against those who worked for a weekly or monthly wage. That applies to women as well as men. *The other 50%* that made up the list were made up of some of the executives or managers of firms or presidents or owners of business; **the colored population was taken into consideration; we put some 15 to 20 colored people in the jury box and also put the same number of Chinese into the jury box.**" (158)

In other words 50% were from the working class and **the other 50% were from all other classes:**

> "Q. So that fifty percent in that classification of truck drivers, carpenters, plumbers, longshoremen, people of that general classification that we call working people and their wives made up about half the list?
>
> A. That is correct.
>
> Q. **And the other half was made up of everybody else?**
>
> A. **Yes.**" (222:19 et seq.)

The great difficulty is that people are usually in more than one class. It is impossible to get proportionate representation of classes (even if called for) unless only one

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44. Less important is the same sort of mutilation and consequent misstatement of a stipulation of counsel for the respondent (see Petition, p. 9). To get the proper sense the reading must start at R. 231:19.

basis of classification is used (*Cf. Fay v. New York,* above; *U. S. v. Local 36,* 70 Fed. Supp. 782; *State v. Koritz,* 227 N.C. 552, 43 S.E.2d 77). The problem presented by the inclusion of women is an instance (Cf. *Fay v. New York,* above). They, like negroes, chinese, members of particular religious groups, etc. appear all along the social and economic scale. It is more difficult to determine their occupation and economic status than in the case of men (usually they list themselves only as housewives) and so to get a proper balance in other classifications. Women are not as likely to present claims of exemption as are men. A selection starting with 60% men may well end up with a panel of half men and half women. There was no total exclusion as in *Ballard v. United States,* above. That case, the *Fay Case* and the *Moore Case* clearly indicate that the decision in the *Thiel Case* was not disturbing settled and well understood rules and practices shown by the record in that case.

The claim that a majority of the prospective jurors called were connected with the Southern Pacific Company or partial to it calls for no comment. The fact is that four were excused because they were biased against the defendant. And the characteristics of the 37 who happened to be examined in this case shows nothing as to the propriety or the conduct of the Clerk and Commissioner in first putting the names into the box. Even so, the petition does not accurately represent that sampling of the panel. What was learned of these 37 prospective jurors is set out in Appendix C hereto and need not be repeated.

CONCLUSION

It is respectfully submitted that the petition should be denied.

Dated at San Francisco, California, October 26, 1948.

ARTHUR B. DUNNE
Attorney for Respondent.

APPENDIX A

All of the evidence as to what happened before Sunday, February 25, 1940, the day petitioner jumped from the train, comes from petitioner alone. Neither Mrs. Thiel nor Morris was produced.

1. Petitioner's Actions Up to the Day of the Accident.

Petitioner, his fiance, whom he had known about 3 months, and his friend, Johnnie Morris, left San Francisco on Saturday, February 17th, 1940, and arrived in Reno next morning. The object of the trip was his marriage to his fiance. They were married in Reno on the 18th (373, 412, 413, 484-494). All three went to the Senator Hotel,[1] and stayed there through Friday, the 23rd (414, 485, 494-496).

On Monday, the 19th, petitioner quarreled with his wife[2] and started drinking[3] (413, 485, 486, 496, 498). Monday through Thursday he drank and gambled. He drank with Morris; they drank about one bottle of bourbon a day,

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1. When asked whether he registered as "George Wendell and wife—Marin County" he said "A. No, it is not—not that I—no."; that if he used another name he was drunk (494, 495).
He, his wife and Morris did not use their right names (769-773). They occupied rooms 338 and 337 (1044) and the names registered for room 338 were "George Wendell and wife, Marin County, California" (771, 772).

2. He said she told him she had been married twice before; that he had known her and her father about 3 months but had not known this; that he had so testified on deposition and on an earlier trial and now so testified (487, 488). Yet the affidavit for marriage license which **he** signed and swore to showed she had been married before (488, 489, 493).

3. **After** he was asked whether he registered at the hotel under a fictitious name (see note 1) he was inclined to move some of the drinking up to Sunday the 18th (495-497). Earlier, on his deposition (498) and on the first trial (500) he said he **started** after the quarrel on Monday.

and perhaps had some drinks in a bar[4] (374, 501-504). Possibly by Friday, and certainly by Saturday morning, he had lost all their money (413, 501, 504). He was not sure whether he drank on Friday (504). At any rate, on Saturday they left the Senator Hotel with their bill unpaid, leaving their bags (514, 516). On deposition he testified that on Saturday he had only 10 cents left, put this in a slot machine, got 80 cents, and with this bought whisky[5] (505 et seq.).

Petitioner says that on Saturday, the 24th, he was nervous, upset and sick; that he had hallucinations[6] (489, 515); that he was out of money and anxious about getting home (515). Saturday night he and his wife stayed at a different hotel (414, 485, 489).

Petitioner had nothing to drink for over 24 hours before he jumped out the train window.[7] The amounts of alcohol he had taken were not excessive; give no foundation for

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4. Hardly enough to produce DTs in view of the fact Mrs. Thiel drank some of the whisky (503).

5. On the trial he tried to move this to Sunday morning (505). But the rest of the record makes it clear he drank nothing on Sunday and the date was not corrected on the deposition though other dates were (505-513). See note 7.

In any event it was stipulated that he was sober when he got on the train and he so testified (541, 587).

6. On this trial for the first time appellant enlarged on the claimed Saturday night hallucinations; said that he spent all night on top of a dresser, did not go to bed, did not take his clothes off, threw sticks down a light well, etc. Yet, in the same breath, he says his wife was with him all the time and was unmoved by his antics (516, et seq.). His deposition clearly indicated that he did go to bed (516). He says that he did not change his clothes (489, 490). Evidence of his neat appearance the next day contradicts his story.

7. At one point he said he drank nothing even on Saturday (514) and on his deposition said the slot machine episode may have been on Friday (see 505-513 and note 5). In any event it was stipulated he was not drunk Sunday afternoon and evening.

hallucinations that harm threatened.[8] There is nothing to show that he was not fully oriented, that he did not fully appreciate his surroundings, know where he was and what he was doing. He never tried to run away.

2. Petitioner's Actions on Sunday, February 25, 1940, Until Just Before Train Time.

Petitioner says that on Sunday, the 25th, he was nervous and afraid.[8]

Petitioner had nothing to drink on Sunday, the day of the accident (484, 525-530; see notes 5 and 7). He got up about 6 a. m., before sun-up, and left the hotel. Although he claims to have been in fear, before sun-up, he wandered around Reno, alone (418, 489, 525-530). When he left he asked his wife to meet him at the Southern Pacific Depot at 11 o'clock. About 11 o'clock he met her and Morris there. That was the first time he had been there or had any contact with respondent since arrival in Reno (418, 419, 428:1; 489, 522, 525, 526). From the time he arrived at the Southern Pacific Depot until he boarded train No. 9 he stayed in the waiting room, in front of the ticket office, except when all three left for the Western Union office (376, 427, 428, 530).

Before 4 o'clock Mrs. Thiel phoned her mother collect to have money wired. Thiel told his wife what to say (431, 532). All three waited at the station for a reply until about 6 P. M. (427, 428, 530, 545), when they heard the money had been wired, left, and walked to the tele-

8. His fears were also for Morris and Mrs. Thiel, he says (415, 433, 439, 557), a subjective symptom said by plaintiff's witness Dr. Anderson **not** to be a symptom of alcoholic psychosis (647, 660). He says he feared for his wife. But he left her alone and unattended a number of times.

graph office[9] (427, 431, 432, 530, 533). It was then dark (537, 538). From there they walked to the police station and were interviewed (377, 434 et seq., 531), the police saw no reason to detain them and suggested they take their train for San Francisco[10] (1032, 1033, 1035-1041), they walked to the Senator Hotel, paid their bill,[11] got their bags (436, 531, 539), walked back to the railroad station, arriving about 8 o'clock, having stopped to eat on the way (430, 436, 437, 531, 539, 540, 545), and were there till the train arrived (531).

3. Petitioner's Actions From the Time He Returned to the Depot Until He Went Through the Train Window.

The railroad station was lighted and there were people in the waiting room (538). Tickets for San Francisco were bought (546). When the train arrived petitioner, his wife and Morris got on the head end of the second coach, on

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9. Although he says he was afraid and the money was wired to his wife he could not or would not say why he went with them instead of staying at the station (538).

10. There is no claim the railroad knew anything about what happened at the police station. Each of the three was interviewed by Detective Sergeant Castlebury (1029-1031). Thiel did not appear drunk and there was no odor of alcohol (1032). Castlebury, after observing and interviewing them advised them to take their train to San Francisco and said he had no facilities "to guard anyone who apparently didn't need any assistance along that line," and that since he was accompanied by "two normal adults, that he felt that he was in perfect safety" (1033). The Reno police had facilities for caring for people who might harm themselves. When in his judgment there was such a case Castlebury used these (1041). But he never assumed that Thiel should be detained or guarded (1040); he was coherent, knew where he was and looked normal (1037-1039) and no effort was made to detain him and no record or report was made because it was not thought warranted (1035-1036).

11. Although he says he was acting queerly and his wife and Morris knew it, he was given the money received and paid the hotel bill (539).

the station side, practically in front of the waiting room, went into the second coach and took seats. Petitioner got on without assistance (549 et seq., 619). Rippetoe followed immediately behind them. This was the first time Rippetoe noticed petitioner. Nothing had attracted his attention to the three people (614, 619, 620). Yet he had been in the depot since about 4:30 (618).

After the train left Reno, petitioner, Morris and Rippetoe went from the second coach to the smoker (370, 453, 552, 556, 557, 560, 611, 614, 623). Petitioner and Morris took a seat, Thiel next to the window, and Morris on the aisle. Rippetoe was in the seat ahead (450, 561, 612, 613, 633). There was a trainman in the back of the car (450, 451, 561, 905).

About 20 minutes out of Reno, in Nevada, the conductor came through lifting transportation (452, 561, 562, 608, 613, 1074). When he reached Morris and petitioner, Morris stood up. According to petitioner Morris was standing talking to the conductor (562, 624, 626), and according to the conductor the conductor had passed on a step or two (1077, 1095), when petitioner suddenly opened the window and leaped out (454, 562-565, 613-615).[12]

Petitioner undertook to testify in detail to what happened in the smoker, how and why he went out the window and what led up to this. But when he was not testifying in his own law suit his statements were different. At Truckee he was helped by Carl E. Smith, an employee of the California Motor Vehicle Department (1053). He told Smith he had been on relief, looking for a position in Reno, was desperate, did not know what to do and that was why he jumped (1054).

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12. See the complaint and note 3 of the brief above.

William H. Laity drove the ambulance which took Thiel to Reno. On the way in Laity and Thiel talked intermittently (926-936). Laity asked what happened and Thiel said:

> "Well, I really don't know." He said, "There were three of us sitting in front of the coaches, and the other gentleman and I went forward to the smoker," and he said that, "We were sitting there, and on the spur of the moment I raised the window and jumped," and then he said, "I don't know why I did it." He said, "I don't want to die now. At that time I did." (932:12-18)

Next morning, in the hospital, about 24 hours before he was seen by Dr. Wyman (675, 692), Parks, chief criminal investigator for the District Attorney and Sheriff at Reno (948), after receiving permission from the head nurse, talked to Thiel in the presence of the head nurse (949, 950, 953, 955). Thiel told Parks that "he jumped on the spur of an impulse, and before he reached the ground he was sorry he had jumped" (959).

4. Petitioner's Testimony of His Own Mental Condition and Claimed Notice to Respondent.

This case presents grave questions of appellant's veracity. He has testified to what he thinks are helpful details of his Saturday night hallucinations, to an untruthful statement that he did not know his wife had been married before (see note 2), hesitated and then denied that he registered under a fictitous name (see note 1) and was squarely contradicted repeatedly. We might omit any reference to his testimony. The jury was entitled to disregard all of it. But this is what he says:

On Sunday he feared he, his wife and Morris would be harmed (see note 8). He complained to others (415, 432). People in the station looked like they were practically all after him (437). Just before he jumped he saw a man ahead in the smoker who appeared to have a knife in his chest (454). On the first trial he said he did not know the train was moving (574). But after his witness, Dr. Anderson, testified that petitioner told him he became frightened as the train swung around a curve (635, 636), this pretense was given up, and appellant testified that he went to the smoker and the conductor came through, after the train left Reno (561). On this trial there was no such pretense (561). He further testified:

After he first arrived at the station two ticket sellers were on duty (429). He told one that he was afraid to leave the station, and to call a policeman. He heard Morris asked for a policeman, and say he could not handle petitioner[13] (428, 432, 437, 440). Morris made similar statements after return from the telegraph office (439, 440). Petitioner asked for a policeman to ride the train, and was told one would be along soon (437, 438).

After the tickets were bought a policeman arrived (438, 546). Thiel asked him to ride the train (439-443, 736).

After the train arrived the policeman did not get on the train, so Thiel got off, found him, and the policeman got on the train and sat near Thiel[14] (445, 550, 738-741). Later Thiel noticed that the policeman was gone and became frightened (448).

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13. If Morris made such a statement it was untrue. There is no evidence anyone had trouble handling Thiel. Cf. note 10 above.

14. Every other witness on the subject contradicted this.

5. Further Testimony as to Petitioner's Appearance, Conduct, and as to Alleged Conversations.

Petitioner's witness, **Dr. Anderson,** testified: Patients with delirium tremens have hallucinations; they are anxious, have "a flushed face," perspire profusely, have a course tremor, jerky movements, and rapid pulse; these signs would be quite apparent to lay people (655, 656). (No witness, not even petitioner, testified to the presence of any of these signs.) He also said the fears are for self, not others[15] (647, 660).

Mr. Forsyth was the ticket agent from 8 a.m. to 4:30 p.m. (794-796). He first noticed Thiel and his companions when they came to the ticket window, between 10 a.m. and noon, to have him accept a collect telegram wiring for money. He could not, and suggested that they 'phone collect. They came back from time to time to inquire for a reply (796-798). The party was under his observation until he went off duty (798, 799).

Morris was about 5 feet, 10 inches tall, and weighed at least 160 lbs. The woman was tall for a woman and heavily built. Thiel was not over 5 feet 6 inches, and slim (796, 797). All were neat in appearance (797). Morris and the woman were sober, coherent and normal (799). Thiel looked like a man who had a hangover. He talked coherently and was oriented. He did not have the "shakes," and appeared normal. He knew where he was and with whom; he did not stumble or stagger; his face was not flushed; his movements were not jerky; he caused no disturbance or commotion; there was no loud talk or gesticulation. He was not extremely nervous and restless;

15. See note 8. The reaction is to shield self from harm. It is not the attitude of one seeking harm but exactly the opposite.

no more than hundreds of passengers who wait for a train (799-801, 805, 811, 812). Nothing was said about fear of life, nor were inquires made about police (801).

Mr. Wogan, a ticket clerk at Reno for 18 years, was on duty from 4 p.m. until midnight (813). Mr. Forsyth told him of the 'phone call for money (814). Mr. Wogan observed the party from time to time. They were well dressed. He talked only to Mrs. Thiel. She inquired about the money and a restaurant (813-817). Later they left the depot (821). There was no other conversation before they left (814-816). They returned about an hour and a half later (816).

Throughout petitioner was attended by his two companions (813). Wogan's description of the party corresponded with Mr. Forsyth's (817, 824). Mrs. Thiel and Morris were sober, normal, and under no incapacity (817, 818). Petitioner appeared entirely normal (817, 818, 824, 825, 830, 836). He was not demented (842). He did not have the shakes, his face was not flushed, and his movements were neither irregular nor jerky (821). There was no gesticulating, argument, noise, row or anything of that sort (818, 823). Thiel was nervous, but not more so than normal passengers. He did not look drunk or alcoholic (817, 818, 834). He did not then appear to have a hangover (834). The party appeared to be in proper condition to be sold tickets (834, 836, 837).

Mr. Wogan had no conversation with either of the men (816, 817, 819). About 8 o'clock he sold Mrs. Thiel 3 coach tickets (816, 819). Although petitioner looked normal, because of an earlier remark to him, he asked Mrs. Thiel whether anything was wrong with petitioner. She

said that he was somewhat nervous, but for no definite reason; that it might be the altitude; that he was disturbed by too many people. She declined to take a drawing room (819, 833, 835). Mr. Wogan flatly denied any such conversations as petitioner had testified to that petitioner was afraid, or police protection was requested (819, 826).

Mr. Sorenson, a railroad police officer regularly commissioned by the Governor of Nevada came on duty at about 8:30 p.m. (443, 582, 585, 842-844). He observed petitioner and his companions, but had no conversation there with either Mr. or Mrs. Thiel in the station (845, 874). Morris said that Thiel had been drinking heavily lately, was "acting crazy," and that Morris had come to bring him home; that Thiel had tried to run away once; "After I get him on the train then I will be all right" (595, 844, 848, 875, 876-886).[16] He observed the party until the train left (849), but had no further conversation, except as noticed below. Petitioner looked normal and was not drunk (849, 850, 879, 887, 888, 890, 891). Mr. Sorenson denied that he was asked to ride the train, or was told petitioner was afraid or would harm himself, or would not go without protection or that he, Sorenson, said he would go along (845). Mr. Sorenson followed the party to the train, but did not go in the car. Before the train left he got on the car platform and looked in, as he often did, but he did not go in (850, 851, 875).

While Mr. Sorenson was on the station platform, petitioner came out. He did not ask Mr. Sorenson to go with

16. Thiel claims to have been present at the conversation (735 et seq.).

him. Later Morris came along and Mr. Sorenson said that Thiel had stepped out of the car, to which Morris replied that it was all right, "I'll take care of him now" (850, 851, 878).

Mr. Sherman, the brakeman, testified that while he was at the car entrance Morris came out and said to the policeman, "It is all right, I will look out for him," which prompted Sherman to ask what was the matter. The policeman said, "I think he has been drinking" (903-905). Petitioner did not look drunk. There was nothing wrong with him that Mr. Sherman saw (906, 918).

Mr. Cosgrove,[17] the conductor, first noticed petitioner when he was collecting the tickets; that till then there was no conversation with petitioner or any of his companions (1075, 1076, 1085). He noticed nothing unusual. He was just sitting quietly in his seat (1078, 1114).

Petitioner's witness **Rippetoe** had been at the station since 4:30. He got on the train just behind petitioner and his companions. Nothing attracted his attention to them. He sat behind Thiel. He did not notice petitioner before he got on the train; there was no loud talk or arguing, and he heard nothing said about petitioner not wanting to stay on the train. Thiel did not talk to the conductor. While the policeman got up on the car, he did not come in and sit down as petitioner testified (612-615, 619-621, 625, 626). There was nothing unusual in the smoker (633).

Petitioner's witness **Buck** was a passenger. He got on at the rear and walked through to the smoker. He saw nothing unusual. His attention was first attracted by the

17. He died before the second trial and his testimony at the first trial was read so it was exactly the same.

commotion when Thiel jumped through the window (708, 709).

6. Petitioner's Condition Was Not in Fact Such as to Require Special Care or Attention From Respondent.

The claim that Thiel was abnormal before he jumped can be supported only by his testimony. His veracity was open to grave question.[18]

The conversations prove nothing. They were admissible, in an attempt to impute notice, but are no evidence of the fact. They are untrue. If Morris said appellant was acting crazy, was hard to handle, and had tried to run away, it was untrue. There was no basis in Thiel's conduct. The only basis could be what Thiel said. Thiel may have said that he was in fear. He had quarreled with his wife. What motive of self-pity, to attract attention or sympathy, he had he does not say. It is a legitimate inference that he was talking for effect.[19]

But there is something more substantial. There was nothing unusual in his appearance. Not even he testified to any abnormality in appearance or action, or any outward symptom of D. T.'s. To anyone who saw him he was normal.[20] There was nothing wrong with his per-

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18. His testimony is inherently inconsistent. It does not square with his own medical evidence (see note 8 above). It is contradicted in almost every particular where others were present and available to contradict it, including his own witnesses. It is contradicted by his own conduct and statements. See note 19 below.

19. He never explained why he registered at the Senator Hotel under a fictitious name (note 1 above) or how he could have been ignorant of his wife's previous marriage when the fact was stated in his affidavit on application for a marriage license (see note 2 above).

20. Compare his own witness Castlebury (note 10 above).

ception or recollection.[21] He described in detail the events of the week in Reno. Although he claims to have been in fear of injury, he wandered around Reno in the dark early on Sunday morning. He had little, if anything, to drink since Friday. His speech was normal, coherent and rational. He claimed to remember conversations. He remembered and recited in detail the events of the day of the accident, and the construction and arrangement of the station (534 et seq.; 795). He knew who he was with, what he was doing and where he was going. He recognized policemen, ticket sellers, the Western Union office, hotels, a police station, a place to eat, etc. He knew he needed money and what to do to get it. There was no loud talking or unruly conduct, gesticulation or commotion. He required no assistance. He moved normally. He knew he was getting on a railroad train, and where it was going. He knew with whom he got on. He got on willingly. He knew tickets must be bought and surrendered. On the train he appreciated where he was, and, after the train left Reno, that it was moving. At all times he was accompanied by two people capable of caring for any need.

7. Respondent Was Not Guilty of Negligence in Being Unable to Prevent Petitioner From Leaping From the Train.

It is argued that respondent owed to petitioner the duty of the highest care. While ordinarily as to transportation a common carrier owes that duty, this rule does not apply where the risk realized was injury to the passenger from his own conduct. (*Fagerdahl v. Coast T. Co.*, 178 *Wash.* 482, 35 P.2d 46.) A passenger's disability, if any,

21. Want of memory is one of the symptoms of DTs. His Dr. Anderson so testified (647, 657-659).

does not change the carrier's duty or increase the **degree** of care required. It is only a circumstance in view of which care is to be used. (See *Alabama etc. R. Co. v. Alseep,* 101 F.2d 157 (C.C.A. 5); *Gulf etc. R. Co. v. Conley,* 113 Tex. 472, 260 S.W. 561, 563.) Under any rule the carrier "is bound to guard only against those occurrences which can be reasonably anticipated," and a "reasonable man * * * will neither neglect what he can foresee as probable, nor waste his anxiety on events that are barely possible." (*Atchison etc. Co. v. Calhoun,* 213 U.S. 1, 9, 53 L.ed. 671, 675; *Kansas City Southern Ry. Co. v. Pinson,* 23 F.2d 247 (C.C.A. 5).)

Nor is there any occasion to discuss intoxication or its effects and negligence or contributory negligence. Intoxication or its effects does not excuse negligence, nor does it affect defendant's duty, except only where an unattended passenger is obviously so intoxicated as to be helpless, and is seen in a dangerous position. There is no case where intoxication affected the result, except where the injured party was, to the knowledge of the carrier, **incapable of caring for himself.** Respondent was entitled to judgment as matter of law unless appellant was under a known disability.

The first essential is the existence **in fact** of the requisite disability. The only disability claimed was mental.

Just any mental incapacity—any deviation from the normal sober person—will **not** do. The evidence must show "need of special attention" and "that the passenger is at the time **incapable of taking care of himself.**" (*Welch v. Spokane etc. R. Co.,* 91 Wash. 260, 157 P. 679, 681.) The passenger must be "in a helpless condition."

(*Gates v. Bisso Ferry Co.*, 172 So. 829 (La. App.).) Special attention is required only "under special circumstances" and "the mere fact that a passenger is drinking or under the influence of liqour is not enough"; "intoxication that does not produce helplessness or incapacity" will not do; if the passenger is "merely rendered less capable of protecting himself from accident or injury, than he otherwise would be, or his condition induces him to become more indifferent to his safety, he must take the consequences of his own recklessness," and "his right to recover is no greater than would be that of a sober person." (*Louisville Ry. Co. v. Gregory's Adm'r*, 141 Ky. 747, 133 S.W. 805; *L. & N. R. Co. v. Barnes' Adm'x*, 297 Ky. 616, 180 S.W.2d 547.) This requirement is not confined to drunks; in other cases it must render the passenger "unable to care for himself." (*St. Louis etc. Ry. Co. v. Adams*, 163 S.W. 1029 (Tex. Civ. App.).)[22] The incapacity must have relation to what it is claimed the carrier failed to do. If the loss of a leg requires special care, it does not impose liability for failure to prevent suicide.

At least until appellant went through the window[23] he

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22. See also *Paris etc. R. Co. v. Robinson*, 104 Tex. 482, 140 S.W. 434; *Louisville etc. Co. v. Mudd's Admr'x*, 173 Ky. 330, 191 S.W. 102; *Dabuey v. R. Co.*, 140 Ill. App. 269 and *R. Co. v. Carr*, 47 Ill. App. 353 quoted in the *Welch Case* above; *L. & N. R. Co. v. Phelps' Admr'x*, 181 Ky. 689, 205 S.W. 793.

23. Even this does not necessarily indicate that at that time Thiel was suffering such mental derangement as to require attention from anyone. A deliberate and thoughtful intention to harm one's self is not a disability within the rule we are discussing.

But even if it could be assumed that this act alone was evidence from which an inference could be drawn, it was evidence of a mental condition only at **that** time. It is no evidence of mental attitude, at an earlier time. All the other evidence, upon which he relies, indicates that he was in fear of harm, sought protection from it, and knew what steps to take to get protec-

was not incapable of caring for himself. If there were any deviation from normal, it was an unfounded fear of harm and a desire to avoid it, with mental capacity to know how; not a mind that invited injury.[24] (Cf. *Chicago etc. Ry. Co. v. Sears*, 210 S.W. 684 (Tex. Com. App.).)

Even if the requisite disability exists, this is not enough. Its existence must be known to the carrier. The carrier has no duty to examine passengers. It can presume they are sane and sober until it has actual knowledge to the contrary. The doctrine of constructive notice has no application. (*Fagerdahl v. North Coast T. Co.*, above;[25] *Watts v. Spokane etc. R. Co.*, 88 Ore. 192, 171 P. 901, 906; *S. P. Co. v. Buntin*, 54 Ariz. 180, 94 P.2d 639;[26] *Paris etc. Co. v. Robinson*, 104 Tex. 482, 140 S.W. 434, 439;[27] *Shipman v.*

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tion from the harm he feared (compare *Chicago etc. Ry. Co. v. Sears*). Moreover, while we have this evidence of his rash acts before us now, as one of petitioner's cases, *Dokus v. Palmer*, 130 Conn. 247, 33 A.2d 315, 318, points out "the defendants at the time of the accident had not."

24. If his condition were as claimed by him and respondent knew it, it could reasonably anticipate this and act accordingly. See Dr. Anderson's testimony.

25. Stating the rule by quotation from *Sullivan v. Seattle Elec. Co.*, 51 Wash. 71, 97 P. 1109, 1112, and *Welsh v. Spokane etc. R. Co.*, 91 Wash. 260, 150 P. 679. The *Sullivan Case*, opinion by Rudkin, J., later Senior Circuit Judge of the Ninth Circuit, held an instruction prejudicially erroneous which permitted recovery if the carrier's agents, although they did not know of the disability, should have known of it. In the *Welsh Case*, it was said that there was not even a duty of "observation" to ascertain the passenger's condition.

26. "But if the carrier does not know of the abnormality it owes no more care to the abnormal than it would to a normal passenger, and it is under no duty to make an investigation to determine the condition of the passenger."

27. Accord with the cases above that there is no duty of examination or even of observation: *So. P. Ry. Co. v. Hayne*, 209 Ala. 187, 95 So. 879; *Ill. C. R. Co. v. Cruse*, 123 Ky. 463, 96 S.W. 821; *Willets v. Buffalo etc. R. Co.*, 14 Barb. (N.Y.)

United etc. Co., 70 R. I. 454, 40 A.2d 730.) If the passenger's condition is revealed only by the accident, there is no liability. (*Welsh v. Spokane etc. R. Co.*, supra; see note 23.)

But more, **the carrier must have actual notice of the precise kind of disability.** If it has notice of one disability it cannot be held for failure to guard for a different disability. (*Fagerdahl v. North Coast T. Co.*, above; *St. Louis etc. Co. v. Adams*, 136 S.W. 1029 (Tex. Civ. App.); *Chic. etc. Ry. Co. v. Sears*, above. Compare *Welsh v. Spokane etc. Co.*, above; *Watts v. Spokane etc. Co.*, 88 Ore. 192, 171 P. 901, 906; *S. P. Co. v. Buntin*, above; *St. Louis etc. R. Co. v. Dobyns*, 54 Okla. 643, 157 P. 735, 738.)

What was respondent's knowledge? There was nothing in petitioner's appearance or actions to indicate mental disturbance. Passing from what respondent could observe to what petitioner claims was told (whether true or untrue),[28] it remains that what was told comes to this: Thiel did not like crowds, feared someone would harm him, was afraid to leave the station (although he did leave it) and wanted protection—not general protection, but protection from gangsters. That we were told he **had** been drinking, was meaningless. He was not then drunk, and did not appear to be. There is no claim we were told (1) he would harm himself or had threatened to, or (2) did not want to go on the train. He had not tried to harm himself. His mental attitude was one of avoiding harm. He did want to go on the train. He offered no resistance, and had no attitude of resistance.

585; *Gulf etc. R. Co. v. Garner*, 115 S.W. 273 (Tex. Civ. App.); *W. & A. R. Co. v. Earwood*, 104 Ga. 127, 29 S.E. 913; *Scott v. U. P. R. Co.*, 99 Neb. 97, 155 N.W. 217.

28. His claims were denied.

There was no one threatening Thiel. We knew this. So it comes to this: We are told that petitioner wants protection from non-existent harm from non-existent persons. As matter of law or fact, what steps should we have taken to protect him from a non-existent threat of harm? What could we anticipate from a non-existent condition? (Compare the *Sears* and *Adams Cases.*)

We knew nothing which would give rise to a reasonable anticipation that harm would come to petitioner. We had no notice of any mental condition such that harm would result, or that petitioner was in a position of danger when there was still time to act to prevent injury. Until petitioner went out the window he never was in danger.

Even when passengers are disabled, from drink or otherwise, and are **unattended**, if not in a position of danger the carrier need not act against a risk not then present. It need not guard the passenger "to prevent him from injuring himself, or placing himself in a place of danger." (*St. Louis etc. Ry. Co. v. Carr*, 47 Ill. App. 353; the *Welsh Case* above.) The rule has been applied to a passenger on a bench in a waiting room (*Fagerdahl v. North Coast T. Co.*, above); asleep on a bench on a ferry boat (*Gates v. Bisso Ferry Co.*, above); on a platform of a car stopped on a trestle (*Louisville Ry. v. Gregory's Adm'r*, above); seated in moving railroad cars (*Olson v. Minn. etc. Ry. Co.*, *v. Adams*, 43 N.D. 371, 175 N.W. 371. See also *Sullivan v. Seattle Elec. Co.*, 51 Wash. 71, 97 P. 1109, and *Thixton v. Ill. C. R. Co.*, 29 Ky. 910, 96 S.W. 548).

Where a passenger under a mental disability is with an attendant or companion apparently capable of caring for him, the carrier owes no duty of special attention, and

is not liable if the passenger hurts himself. (*Gates v. Bisso Ferry Co.*, above; *Boyd v. Alabama etc. Co.*, 111 Miss. 12, 71 So. 164, and 655; *Olson v. Minn. etc. R. Co.*, above. Cf. *Fagerdahl v. North Coast T. Co.*, above. These cases deal with intoxicated or otherwise mentally incapacitated passengers. Compare: *So. Ry. Co. v. Hayne*, 209 Ala. 186, 95 So. 869; *Arnett v. C. & O. Ry. Co.*, 198 Ky. 742, 248 S.W. 1040; *L. & N. R. Co. v. Dyer*, 152 Ky. 264, 153 S.W. 194.)

Respondent, as to the claim of failing to provide a guard, was entitled to a directed verdict. But, if not, there was a jury question. If our evidence was believed, and it was, there is no liability. The only claim of notice is through the policeman and two ticket sellers. The ticket sellers denied any conversations which could convey notice of any incapacity. If it cannot be said as matter of law that the policeman was acting only under his state commission, in view of the presumption if for no other reasons, the jury could find as a fact that he was appealed to in his official capacity and was acting under state authority and not as our agent. It could find he was not on notice and exercised proper care.

The jury, under instructions not now questioned, could and did find that there was no breach of duty in the circumstances of this case.[29]

But there is a shorter answer. Morris was in the seat with petitioner. Rippetoe was immediately ahead. Con-

29. Petitioner makes some reference to a circular and rules put out by respondent (Plf. Ex. 1). (1) The circulars clearly state to what they apply. They apply only to "demented" passengers, or passengers who are incapable of taking care of themselves. (2) Even if they did apply, the question of negligence was still for the jury.

ductor Cosgrove was a step away. Petitioner went so fast that no one could stop him. Another attendant could not have done more. Any failure to provide a guard was not a cause of injury (*St. Louis etc. Ry. Co. v. Adams,* above).

For closely parallel facts see:

Chicago etc. Ry. Co. v. Sears, 210 S.W. 684 (Tex. Com'n. App.);

St. Louis etc. Ry. Co. v. Adams, 163 S.W. 1029 (Tex. Civ. App.);

Boyd v. Alabama etc. Co., 111 Miss. 12, 71 So. 164 and 655.

With these should be compared:

Olson v. Minn. etc. R. Co., 43 N.D. 371, 175 N.W. 371;

Gates v. Bisso Ferry Co., 172 So. 829 (La. App.);

Fagerdahl v. North Coast T. Co., 178 Wash. 482, 35 P.2d 46;

Paris etc. R. Co. v. Robinson, 104 Tex. 482, 140 S. W. 434;

L. & N. R. Co. v. Mudd's Adm'x, 173 Ky. 330, 191, S.W. 102.

In the *Sears* and *Adams Cases* the mental aberration claimed was the same as here,—hallucination of danger from robbers.

No case supports petitioner's claim. The farthest any goes is to hold that there was a jury question, and these are distinguishable. The cases above hold that the carrier was entitled to judgment as matter of law.

8. There Was No Negligent Delay in Stopping the Train After Petitioner Was Out the Window.

Taking estimates from men admittedly in no position to estimate correctly, and disregarding what actually was done, petitioner claims delay in stopping the train.

Rippetoe estimated he was holding Thiel, dangling from the window, from 1 to 5 minutes (616) but said that in the circumstances it was very hard to judge time[30] (628). Thiel was kicking, trying to get loose (627, 635). He testified that the conductor said "Let him go" (617). This was denied,[31] but could have no bearing because petitioner was **not** turned loose; he was held until his coat broke and he slipped from it (616, 617).

The conductor testified that after he had passed just beyond Thiel and Morris he heard a window open and someone holler (1077, 1078, 1095). He immediately turned, got Thiel's collar, and held until the coat tore and Thiel fell.[32] Up to that time his whole attention was centered on Thiel (1078, 1080, 1095, 1096, 1098, 1102, 1113). He did not remember Rippetoe having a hold (1078, 1096, 1097). As soon as Thiel fell he gave a stop signal (1080, 1102). He could not say whether anyone else did (1102, 1114), but by the time he signaled the train was stopping (1080, 1099).[32] The time from the time petitioner "went through

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30. On his deposition taken by the plaintiff August 3, 1942 (628) Rippetoe said "You know time. You are not much of a judge of time then," (629); that his best estimate was "Well, something like a minute." (630).

31. The conductor flatly denied he made any such statement (1113). Clark across the aisle heard no such statement (786). Brakeman Sherman testified that he heard someone say "He is gone" (907).

32. Clark corroborates this (790).

the window" "for said train to come to a stop" he estimated at a minute or less (1101, 1107).

The brakeman, back in the smoker (905), saw the conductor lifting tickets. As the conductor turned, the window went up and a man went out. He was grabbed immediately by Morris and the conductor (906, 911). Immediately, the man still being held, Sherman gave a stop signal (906). The brakes were applied at once (907, 912). Sherman immediately got his lantern and went to the rear platform of the car. As he opened the door someone said "He is gone." He gave a stop signal, a "wash-out" with his lantern (907, 912). There was an attempt to suggest that Sherman was too short to reach the signal cord, but he pointed out that he had been doing it for 33 years (907).

Sherman is corroborated by Buck. Buck was at the front of the smoker, reading (702, 706). A commotion in back attracted him, he stood and immediately turned (704, 707, 709). He saw a group and a brakeman with his hand up (704). He thought the brakeman couldn't reach the cord, but "I could not swear to it." He pulled the cord. The brakeman signaled to do it again (704, 705, 707, 708).

Engineer Tassi testified: He was running about 40 miles per hour (717, 722). He received a stop signal and acted at once with the heaviest brake application he could make safely and made the fastest possible stop (711, 712, 717, 718, 720). He stopped in about 1000 feet,—he could not have stopped in 500 feet (712). They then backed. It was a dangerous move to back into the face of a following train (714-716).

It is fantastic to suppose that in the circumstances any man could estimate time accurately. The time elements

are better spoken by what the men did, than by what they say.

Immediately petitioner went out the window he was grabbed. His coat tore at once and he fell. The conductor immediately signaled the train to stop. But the signal already had been given by Sherman or Buck, or both, and the engineer had acted.

9. There Was No Negligent Failure to Render Aid.

On the first trial it was claimed that Dr. Bernard, the doctor who gave emergency treatment at Truckee, was negligent. On the second trial by stipulation this claim was abandoned (1013, 1014). The issue was submitted to the jury on evidence of other conduct claimed to show negligence. The jury found there was none.

As soon as the train could be backed—i.e., protected against a following train—it was backed to petitioner (907, 1080). Sherman got a stretcher from the baggage car, petitioner was put in the baggage car (714, 721, 920, 922, 1046, 1081), and rushed to a doctor (721, 1051, 1081, 1083, 1109).

Conductor Cosgrove was the first one to reach petitioner (1107). Inquiry was made of the Pullman porter for first aid equipment, usually carried in the Pullman car, but there was none (922, 1107). However, while petitioner had bled, he was not bleeding much (1107, 1109). The conductor fearing infection, did not bandage with sheets from the Pullman car (1107). If he had wasted time looking for string or wrapping it would have taken another 25 to 30 minutes. In that time they got petitioner to the doctor (1108). It was the conductor's idea to get him to Truckee as fast as possible (1109).

Mr. Wilcox, the express messenger, made space for petitioner in the baggage car. Mr. Wilcox had two banks of steam pipes in the baggage car. One was on. He turned on the other, the double bank. It was hot in the car. Petitioner was not bleeding badly. He lost about a pint. All haste was used to get to Truckee (1046-1052; cf. 696). Dr. Bernard attended appellant at Truckee (1063, 1064). Petitioner was suffering from shock, and open, dirty wounds (1063). There had been and was very little bleeding. The crushing nature of the injuries had controlled the flow of blood. A tourniquet was not called for. He had not bled enough to affect him (1067, 1068, 692, 693, 1070, 1071). Dr. Bernard and Dr. Wyman both testified that the immediate first aid required, and given by Dr. Bernard, was of such character that it could not have been given except by a doctor with instruments; not even by a registered nurse (694).

The testimony of Drs. Anderson and Wyman[33] shows that the steps taken were proper; that the immediate steps were to control bleeding, splint obvious fractures, keep the patient warm and combat shock and get him to a doctor (648-650, 662, 666, 667). A tourniquet only controls bleeding (649, 664, 692). If, as a result of a traumatic wound, bleeding is controlled, a tourniquet is not needed (665, 693). Dr. Bernard testified that no tourniquet was necessary. As to splinting, Dr. Anderson testified that 15 minutes would be better spent in getting the man to a doctor than taking time to hunt up a splint and to apply it (666, 667; cf. 695-697), that an open wound with dirt ground in could not be cleaned except by use of instru-

33. Petitioner's witnesses.

ments, operating room equipment and anesthetic (661, 663, 694) and what should be done is a matter for the person on the scene (669), that if there were any infection, it would have come from the wounds **at the time of injury** (661, 663) and that if a wound would not come in contact with anything, it would be better to leave it exposed to the air than risk infection by bandaging with material not known to be sterile (664, 694).

It clearly appeared that the only infection introduced was at the time of injury and there was no evidence that anything done or not done before Thiel reached a doctor's hands in any way introduced new infection or aggravated any existing condition. Any claim that want of first aid care contributed to any after effects is without support in the evidence. The train crew did the only things they should have done. Of first importance was to get petitioner to a doctor, and then to a hospital. Proof of the wisdom of the course pursued is that petitioner is alive. There is not a word of evidence that any injuries resulted from or were aggravated by what was or was not done for him.

APPENDIX B

The testimony of Mr. Calbreath, the Clerk, and Mr. Mikulich, the Jury Commissioner[1] showed:

The areas from which names were selected was enlarged in 1940 to include the general commuting area tributary to San Francisco and again in 1943 when Mr. Calbreath became Clerk (C. 219:17 et seq.; 223:17; M. 200:20). It included the counties of San Francisco, San Mateo, Alameda and Marin. The Commissioner took a few names from southern Contra Costa. About 50% of the names were from San Francisco, some 20% to 25% from Alameda, and the remainder from the other counties. Within each area the attempt made was to get a geographical cross-section and to take an appropriate proportion of the names from each part. Lists of registered voters, city directories for San Francisco and Oakland, and phone directories were used; about 50% of the names came from the lists of voters, a small part from telephone directories and the remainder from city directories (C. 155:15-159:10, 214:18; 220:18; M. 160:21-161:18; 164:17-19; 166:4 et seq.; 184:7; 191:2; 195:1; 200:15; 204:1). The names were taken at random, from the top of one list, from the end of the next, from the middle of the third, etc. (C. 156:21; 159:16; 215:3; 224:23; M. 160:21-161:18; 194:17-195:6).

Using their best judgment the attempt was made to get a fair cross-section of this whole community within commuting distance of the court (M. 184:1 et seq.; 191:2; C.

1. "C" refers to testimony of the Clerk, "M" that of the Commissioner.

216:22; 218:14; 219:6; 224:19). No class was excluded for any reason whether the class was one defined by race, color, creed, occupation, economic status or otherwise. In this respect a change had been made and included were those working for an hourly or daily wage. The only exclusions were those of people disqualified or exempt as provided in the California statute. No class was excluded. (C. 157:24; 220:3 et seq.; 221:4; M. 201:2-202:15; 170; 221). Indeed, in many instances the business connection of a person whose name was selected was not known. The salary, financial and economic status of the persons selected were not known. No attention was paid to occupation unless it showed exemption or disqualification and except that if one class, e.g., insurance people, was too heavily represented, an adjustment was made so the list would fairly represent all classes (C. 156:25 et seq.; 215:16 et seq.; 218:22; 220:13 et seq.; M. 165:10; 184:20; 193:18; 201:5). There was no attempt to get people of higher intelligence or other than ordinary intelligence and there was no information on this except as occupation showed it (M. 191:21; C. 214:3).

Mr. Calbreath testified (158) that he tried to select approximately half of the proposed jurors from the working class, making no distinction between those who worked for a daily wage and those who worked for a weekly or monthly wage. It is asserted that the other 50% was made up of "executives or managers of firms or presidents or owners of business" and "the remaining 50% was chosen from all others eligible" (see Petition, pp. 7 and 14 and compare the mutilated quotation at the top of p. 7). This perverts and **reverses** the meaning and what the

Clerk said. His testimony was that he "endeavored each time to select approximately half of the proposed jurors from the working class" with no distinction between those working for a daily, weekly or monthly wage and,

> "*The other 50%* that made up the list were made up of some of the executives or managers of firms or presidents or owners of business; **the colored population was taken into consideration; we put some 15 to 20 colored people in the jury box and also put the same number of Chinese into the jury box.**" (158:8) [The matter in bold face is omitted in the quotation made at p. 7 of the petition. The omission distorts what was said.]

In other words 50% were from the working class and **the other 50% were from all other classes:**

> "Q. So that fifty percent in that classification of truck drivers, carpenters, plumbers, longshoremen, people of that general classification that we call working people and their wives made up about half the list?
>
> A. That is correct.
>
> Q. **And the other half was made up of everybody else?**
>
> A. **Yes.**
>
> Q. Was that other half restricted to high-salaried executives of corporations?
>
> A. Well, I don't know what a high-salaried executive of a corporation is, but I do put in some vice-presidents of banks. I put them in there—tellers of banks, general managers of plants, owners of small businesses. For instance, I put a tailor, a man who owns a tailoring business, I put him in that class.
>
> Q. And a cleaner and dyer?
>
> A. If he owns a business, I put him in that class.

Q. Neighborhood grocery store?

A. Yes.

Q. Or a meat or grocery concessionaire in a large market?

A. Yes.

Q. You put them in that classification?

A. Yes." (222:19-223:12)

He did not try to get a group of a particular class or discriminate by excluding any particular class, or by overloading or including any particular class and in this sense endeavored to equalize; if he found he was overweighed by department store clerks or insurance people he balanced by taking carpenters or butchers or other people of that class (221:2).

The Jury Commissioner was asked what percentage of businessmen, executives, managers and owners of business he selected and replied by asking what was meant by executives (167:1-168:24). The term was not thereafter used. He then said that he endeavored to divide between "people who were working for a wage, daily or by the month, laboring people, business people * * * about half the names of **business people** in and the other half those that are working for wages"; trying to get a balance; "50% of employers, businessmen, **and so forth**, as against 50% of people earning wages, daily or weekly" (171:5-172:4; 174:21). He made it clear that by "business people" he did **not** mean owners, officers of corporations or principal executives of large business concerns. He testified that on the list as a whole there had been an increase of laboring people (188:2), that from 25 to 30% represented manual laborers (174:25-175:8; 183:15) and that by business people he did **not** mean managers and executives;

that there were very few executives (205:25); that there were not 50% of managers and executives (207:9; 208:5); **that among business people he included all people who were connected with business**; that business people would include people operating small businesses of their own, such as a storekeeper, a market keeper, a butcher having a concession, department managers, buyers and people of that class, employees of business houses as salesmen and accountants; that he did not intend the expression to mean officers of corporations or executives (203:7-25); that a young lady who was a clerk would be a business person and he would include clerks, stenographers, solicitors, and salesmen (205-206:21):

"Q. I present again that the record is indefinite. Counsel said in the other fifty per cent you put in —and we have been talking here about a fifty per cent and I don't know whether that is this fifty per cent or not, but fifty per cent or half of the people on your list are managers and presidents and officers of corporations, and business people of that type?

A. **No, they are not.**

Q. So, you are talking about business people and you mean people connected with what you would call a business house, an insurance concern or a stationery or a department store, whatever their occupation or position might be there?

A. **Yes**, that is my interpretation of business.

Q. That may include some department heads?

A. Yes.

Q. But it would also include a salesgirl?

A. Yes.

Q. Or a stockroom clerk?

A. Yes.

Q. Or salesman or solicitor, people of that type?

A. Yes." (208:5—208:21)

"I am telling you my idea of business people are people that are connected with business. I wouldn't call a hod carrier a business man, but I think a clerk, a salesman, a man connected with a business, any type of business, are business people." (209:7-11)

APPENDIX C

Jury Impanelment.

We outline the information obtained about the 37 prospective jurors called when the jury was empanelled.

Twelve jurors and an alternate were selected. Of the 12, 8 were men and 4 were women. The alternate was a woman. During the trial two of the 12 became sick and were excused. They were:

Albert N. Wilmes (273, 319, 725, 726), sign painter operating his own business.

Zola Taylor (343, 725, 726), bookkeeper, American Trust Co.

The 4 women who served throughout and were among the 11 who returned the verdict were:

Mrs. Mary A. Stewart (273, 280, 281), occupation not disclosed.

Miss Bessie P. Walthall (273, 317), occupation not disclosed.

Mrs. Julie Mescovich (358), wife of a restaurant keeper.

Mrs. Lei Troupe (365), occupation not disclosed.

The seven men who served through and were among the 11 who returned the verdict were:

Elmo J. Martinez (273, 335), shipping clerk, American Chicle Co.

D. P. Surber (314, 342), U. S. Army retired.

Carl A. Rick (315), in mortgage loan department of Prudential Insurance Co. (317), otherwise nature of employment not disclosed.

Joseph De Martini (324, 325), wholesale tobacco, partnership with his brother.

Frans Schmitt (337, 339), retired leathergoods manufacturer.

Warren J. Tyson, Jr. (348), clerk, Signal Oil Co.

Louis A. Pastroni (352), teller, Bank of America.

A total of 11 women were examined. They were in addition to the 5 selected (see above):

Florence M. Douglas (273, 286-289), sales manager and buyer for a rice business. Excused at plaintiff's suggestion.

Mrs. A. McCallon (289, 290), secretary to an S. P. Co. executive. Excused.

Mrs. Eleanor Van Praag (314), occupation not disclosed. Said she was prejudiced against defendant. Excused.

Nell A. Biggins (314, 329), with Sunset Feather Co., biased in favor of plaintiff. Excused.

Miss Dianna M. Domeconi (346, 347), occupation not disclosed and excused because biased in favor of plaintiff.

Mrs. Helen G. Starr (350-352), occupation not disclosed, excused because biased against user of liquor.

In addition to the 3 women excused because they were biased in favor of plaintiff or against defendant **Emil Pahlka** (348), a real estate broker, was excused because biased against railroads.

Of the 37 examined there is not sufficient information to state what the occupation or economic or social position of 9 was. In addition to those noticed were **Harvey P.**

Clark (273, 280, 305, 306), **Harry R. Land, Jr.** (273, 314,—with McKenzie and Co. but the nature of their business and his connection with it did not appear), **Gilbert L. Van Wormer** (300, 302).

There were 10 of the 37 who were in the laboring or wage earning class: **Martinez**, shipping clerk; **Mrs. McCullon**, secretary or stenographer; **Thomas G. Stevenson, Jr.** (306, 307-313), undisclosed connection with a grain merchant and exporter; **Nell A. Biggins** with Sunset Feather Co.; **Ricks**, apparently in a clerical position with a loan department of an insurance company; **Zola Taylor**, bookkeeper; **George R. Dagnall** (329, 336, 337), working at the moment organizing the Marin County Community Chest Drive; **Tyson**, clerk, Signal Oil Co.; **Pastroni**, teller, Bank of America; **James Di Maisimo** (361-363), a carpenter working for a macaroni factory, peremptorily challenged by the plaintiff.

Four were retired: **Surber**, from the Army, position not disclosed; **Andrew Verino** (273, 282, 298, 299, 346), apparently formerly in some phase of the insurance business; **Schmitt**, retired leather manufacturer; **Clarence W. Dobie** (297), retired from an undisclosed position with Crocker First National Bank.

Five jurors held semi-executive positions: **Mrs. Douglas**, sales manager and buyer for a rice concern; **Edgar R. Trethway** (273, 279, 281, 294), credit manager for an automobile dealer; **Homer F. Rosetti** (273, 280, 330, 343), branch manager of Pacific Finance Corp.; **Allen J. Uren** (302), sales manager Gypsum Division, Pacific Portland Cement Co.; **Edwin G. Asplin** (353, 358), purchasing agent and traffic manager for a bakery.

Two were probably fairly important business men. **Thomas R. Edwards** (273, 333), was in the candle supply

business. **James A. Cambridge** (290) was auditor of Anglo California National Bank.

Seven were proprietors of business, the business apparently being small, or self employed: **Wilmes,** sign painter; **Leslie H. Carter** (273, 321), dramatic book publisher; **Seamen J. Molkenbuhr** (323), was apparently the proprietor, or one of the proprietors, though he may have been only a salesman, of a jewelry concern; **De Martini,** partner in a wholesale tobacco business; **Emil Pahlka,** real estate broker; **Mrs. Mescovich,** wife of a restaurant keeper; **George S. Minot** (364), independent advertising counsellor.

Fifteen of the 37 had some connection, close or remote, with S. P. Co. or someone connected with it. **Mrs. McCullon** was employed by S. P. Co. as a secretary. **Rossetti** was the brother of a director. **Clark** knew an S. P. Co. director and possibly owned some stock,—he did not know. **Dobie** owned S. P. Co. stock. **Verino** for a short time, about 1900, had a boiler job with S. P. Co. **Trethway,** 22 or 23 years ago, worked for S. P. Co. for a short time as an investigator; he had a cousin with S. P. Co. and some friends working for it. The concerns with which several were connected were shippers by rail: **Mrs. Douglas, Van Wormer, Uren, Stevenson** and **Asplin.** As was natural, they knew people connected with S. P. Co. **Cambridge** was with a bank which did some banking for S. P. Co. **Molkenbuhr** sold jewelry to an S. P. Co. employees club (not S. P. Co.). **Minot** knew a Mr. Turner.

APPENDIX D

In the United States District Court, in and for the Northern District of California, Southern Division.

Gilbert E. Thiel, Plaintiff, vs. Southern Pacific Co., a corp., Defendant.	No. 21,780

OPINION AND ORDER ON MOTION TO STRIKE OUT ENTIRE JURY PANEL, ETC.

Plaintiff has filed herein a notice of motion for an order: "(a) Striking out or quashing the entire jury panel for the 'July Term, 1946', which is to be used for trial of this action, now set for September 10, 1946; (b) Directing the Clerk and Jury Commissioner of this Court to select a new panel which will be a fair, democratic cross-section of the community without discrimination in favor or against any one group or class of citizens because of their wealth, occupation, sex or race; and (c) Directing the 'parts of the district' of this Court from which 'jurors shall be returned' 'so as to be most favorable to an impartial trial'."

In support of the motion, movant filed a purported affidavit of Attorney Allen Spivock. This affidavit was not offered or received in evidence. In all events the plaintiff can rely on the showing made by the evidence ore tenus. It is incumbent on the moving party to introduce, or to offer, distinct evidence in support of the motion;

the formal affidavit alone, even though uncontroverted, is not enough. *Glasser v. United States,* 315 U.S. 60, 87; 86 L. Ed. 680, 708.

Before taking up the several asserted grounds in support of the motion, and in order to appreciate this more recent attack upon the jury system in this court, the history of the litigation should be given:

On December 30, 1940, plaintiff brought an action against the defendant, Southern Pacific Company, for damages in the sum of $250,000.00 for injuries resulting from a leap from a train. The complaint in substance and effect alleged that plaintiff was "out of his normal mind" on February 25, 1940; that, before accepting plaintiff as a passenger, defendant was informed that he was "out of his normal mind" and therefore should not be accepted as a passenger or else should be guarded; that defendant, Southern Pacific Company, nevertheless accepted plaintiff as a passenger, left him unguarded and when he leaped failed to stop the train before he fell to the ground; that defendant's conduct constituted alleged negligence and caused plaintiff's alleged injuries.

The action was originally instituted in the Superior Court of the State of California, in and for the City and County of San Francisco. On petition of the defendant it was removed from that court to the District Court of the United States for the Northern District of California. The defendant answered, and in substance and effect denied that plaintiff was "out of his normal mind;" denied that said defendant was informed that plaintiff was "out of his normal mind" and therefore should not be accepted as a passenger, or else should be guarded; and denied that defendant was guilty of any negligence, and affirmatively

alleged that plaintiff's injuries were caused by his own negligence; as a separate defense it was alleged that his injuries were attributable to his own negligence.

Plaintiff filed a written demand for a jury trial in the District Court, and thereafter moved said Court to remand the action to the Superior Court. The motion was denied. Thereafter, disregarding the refusal to remand, plaintiff attempted to prosecute the action in the said Superior Court. Defendant applied for, and after a hearing, obtained from the District Court a judgment enjoining such prosecution. The judgment was affirmed. 126 F.(2d) 710. Certiorari to review the decision was thereafter denied. 316 U.S. 698; 62 S. Ct. 1295.

The action was thereafter assigned to trial in the District Court. A panel of prospective jurors was drawn, and the jury was thereupon and thereafter impaneled. On November 5, 1942, plaintiff challenged the array—the panel of prospective jurors drawn as aforesaid. The challenge was overruled. Thereafter plaintiff amended his complaint alleging in substance and in effect that defendant was negligent in failing to give him first aid treatment and medical attention at the scene. These allegations were denied.

Thereafter plaintiff moved the Court to strike his demand for a jury trial. The motion was denied.

Trial of the action was commenced on November 24, 1942. After the jury was impaneled and sworn plaintiff challenged the twelve jurors comprising it. The challenge was overruled and the trial proceeded. At the close of the evidence plaintiff moved the Court for a directed verdict; the motion was denied. The jury thereafter returned a verdict for the defendant, Southern Pacific Company. Plaintiff thereafter moved for a new trial, and also moved

to take depositions; both of said motions were denied. Judgment was entered for the defendant.

Plaintiff prosecuted his appeal. *Thiel v. Southern Pacific Company,* 149 F.(2d) 783, (Circuit Court of Appeals, Ninth Circuit) and therein specified as error the overruling of his challenge to the array. The challenge was based in substance and effect on practically, if not all, the same grounds urged in the motion before this Court. The judgment was affirmed in its entirety.

On certiorari review was had before the Supreme Court of the United States *"limited to the question of whether petitioner's motion to strike the jury panel was properly denied." Thiel v. Southern Pacific Co.,* 66 S. Ct. 472, 66 S. Ct. 984, 985.

The Supreme Court, speaking through Mr. Justice Murphy, held, in effect, that the intentional exclusion of *daily wage earners* from the jury list required the reversal, regardless of whether the plaintiff was prejudiced by the wrongful exclusion or whether he was one of the excluded class, even though the jury which actually decided the factual issues was found to contain at least five members of the laboring class.

Mr. Justice Frankfurter and Mr. Justice Reed, dissented. The Court said, in part:

> "It is clear that a federal judge would be justified in excusing a daily wage earner for whom jury service would entail an undue financial hardship. But that fact cannot support the complete exclusion of all daily wage earners regardless of whether there is actual hardship involved. Here there was no effort, no intention, to determine in advance which individual members of the daily wage earning class would suffer an undue hardship by serving on a jury at the rate of

$4 a day. All were systematically and automatically excluded." 66 S. Ct. 984, 987.

It was not claimed before the Supreme Court that the District Court Judges for the Northern District of California, with the approval of the Circuit Court Judges, designed racial, religious, social, or economic discrimination to influence the makeup of jury panels, or that such unfair influence infused the selection of the panel, or was reflected in those who were chosen as jurors. Nor was there any suggestion that the method of selecting the jury was an innovation. The challenge went to a practice adopted in order to deal with the special hardship which jury service entailed for workers paid by the day. What was challenged, in short, was not a covert attempt to benefit the propertied but a practice designed, wisely or unwisely, to relieve the economically least secure from the financial burden which jury service involves under existing circumstances. 66 S. Ct. 984, 988.

Several other grounds raised and presented by petitioner (plaintiff herein) were in substance and effect identical with those presently urged. They were given no mention in any of the Justices' opinions.

With that historical background of the case established, it is now proper to refer to the more recent events.

On Thursday, June 6, 1946, in the District Court of the United States for the Northern District of California, Southern Division, before Hon. Louis E. Goodman and Hon. Michael J. Roche, the matter of the selection of master trial and grand jury panels for July, 1946 Term of Court came on regularly to be heard at the hour of 4 o'clock P. M., in compliance with Section 276, as

amended, of the Judicial Code (28 U.S.C.A. 412). At that time the Court announced that it was deemed advisable to hold a session so that there could be a *public* drawing of the jurors.

The hearing was duly noticed in "The Recorder" of Thursday morning, June 6, 1946. The "Recorder" is a newspaper of general circulation and the official organ of the court. Carl W. Galbreath, Clerk of the Court, and William C. Mikulich, the Jury Commissioner, were called to testify with respect to the manner of drawing the jurors. The Clerk testified in substance: That he and the Jury Commissioner, collaborated in the selection of the names that were placed in the box; that the box contained 484 names; that the sources were three—the list of registered voters of the Counties of San Francisco, San Mateo, Alameda and Marin; the city directories of San Francisco and Oakland; and the telephone directories of other cities in the counties named. That he went to the Deputy Registrar of Voters of San Francisco and obtained a list for the year 1943, thence to the County Clerk in Oakland and obtained a complete list of the Alameda County registered voters down as far as Hayward for the year 1944; thence to Redwood City and obtained a list of registered voters for San Mateo County as far south as Redwood City and this side of the range of mountains; also that a list of the registered voters of Marin County was obtained; that approximately 50% of the names placed in the box were secured from the lists of registered voters; and that the remaining 50% were derived from the city directories of San Francisco and Oakland, and the telephone directories of cities in the other counties named.

After satisfying the Court that the sources of the names were such as "to be most favorable to an impartial trial, and so as not to incur an unnecessary expense, or unduly burden the citizens of any part of the district with such service," (28 U.S.C.A. 413) Judge Louis E. Goodman then continued the interrogation of the Clerk.

"Q. How did you determine whether or not a person whose name was to be picked might be ineligible for jury duty under the provisions of the law?

A. I would have to depend on the description given in the directory or the list of the registered voters of the occupation of the person I selected.

Q. As between men and women did you use any method of procedure to secure any particular number of men as against women jurors?

A. I endeavored to obtain fifty per cent men and fifty per cent women.

Q. Did you leave out of the jury box the name of any juror whom you had selected because of any special occupation that he might have had aside from these occupations that are made exempt under the law?

A. No, I did not.

Q. Was any person left out because of color or race or creed or occupation?

A. They were not.

Q. What method did you follow in order to secure a cross section selection of jurors as regards occupation or status or color or the like?

A. I endeavored each time to select approximately half of the proposed jurors from the working class; by that I mean I made no distinction between those working for a daily wage as against those who worked for a weekly or monthly wage. That applies to women as well as men. The other fifty per cent that made up

the list were made up of some of the executives or managers of firms or presidents or owners of business; the colored population was taken into consideration; we put from 15 to 20 colored people in the jury box and also put the same number of Chinese into the jury box.

Q. Have you any way of knowing or did you keep any record as to the percentage of names deposited in the jury box that are residents of San Francisco as against the other counties in this district?

A. Yes, approximately one half of the names I selected are residents of San Francisco, one quarter are residents of Alameda County and one quarter are residents of the counties of Marin and San Mateo.

Q. Were there any names remaining in the box at the time that you deposited the names of the prospective jurors that you have referred to?

A. Yes; there was always an average of about one hundred such names remaining in the box when we filled it.

Q. So that when you filled the jury box this time you put in approximately 380 odd names; is that correct?

A. That is correct.

Q. And of those you put in approximately one half and Commissioner Mikolich, put in the other half; is that correct?

A. That is correct.

Q. When you selected names in San Francisco from the list of registered voters did you follow any plan or method with respect to selecting jurors from different assembly districts?

A. I tried to pick a proportionate number of persons from each of the assembly districts in San Francisco.

Q. And did you make any use of the precinct lists?

A. I did. I took the precinct list from each assembly district, and, as I said, I started at the top and went down and found the name of a person that was not exempt and then I went on further and took another one, and then took another precinct list in the same district and did the same thing.

Q. After you had selected the names from the various sources that you have mentioned, did you make any check to see whether or not any of the names that you had picked was ineligible because of recent service as grand or petit jurors?

A. I did.

Q. Or those who had been previously excused because of physical condition or age?

A. I did. I checked the list with the names remaining in the box; with the names on the present trial and grand jury; with the names of persons who had served previously and been discharged, and then with those who had been excused previously on account of age, sickness or physical reasons.

Q. In placing the names in the box did you and the Jury Commissioner place them in alternately?

A. We did."

Thereafter the Jury Commissioner, Mr. Mikulich, was interrogated and stated in substance and effect that the procedure he adopted was identical in all respects with that of the Clerk.

The Court thereafter made the following finding:

"The court finds that the names of the four hundred and eighty four prospective jurors for the July, 1946, term of court, have been properly selected by the Clerk and the Jury Commissioner, as provided by Section 276 of the Judicial Code, as amended."

The testimony elicited from the Clerk has been set forth at some length for the reason that it demonstrates a careful compliance with the views of the Supreme Court in connection with the avoidance of any distinction *"between those working for a daily wage as against those who work for a weekly or monthly wage;"* and, in addition, is demonstrative that the Statutes, 28 U.S.C.A., Sec. 412, et seq. were fully complied with.

With that factual background established, the motion heard on August 19, 1946, before this Court may be analyzed: Plaintiff asserted the following grounds in substance: (1) That the majority of those selected for the jury were business men, etc., and that a small majority of those selected were working men; (2) that a large proportion of the men jurors were selected as compared with women jurors; (3) that no court orders or directions had been given to the Jury Commissioner or the Clerk of Court directing "the parts of the District from which the jurors shall be returned;" (4) that uniform rules were not made for the guidance of the Clerk and Commissioner in the drawing of the said jurors; (5) that no substantial changes in the method of selecting the jurors had been made and that the said decision of the Supreme Court had not been complied with; (6) that a large majority of the persons selected were prejudiced in favor of the defendant Company; (7) that the Jury Commissioner and said Clerk have endeavored to obtain jurors of the highest or superior intelligence and not those of "ordinary intelligence"; (8) that no system of lot or chance was used in selecting said jurors.

On the hearing of this motion the proceedings of June 6, 1946, referred to, were made a part of and read into the

record. Counsel for plaintiff claimed that he did not receive notice of said proceedings.

Notice was not necessary and the hearing was "public" within the contemplation of the statute. 28 U.S.C.A. 412; (Judicial Code, Section 276, amended) *Hammerschmidt v. U. S.*, 287 Fed. 817; *U. S. v. Lewis*, 192 Fed. 633.

The plaintiff then called the Clerk and also the Jury Commissioner, subjecting them to lengthy examination. In substantial particulars their testimony was in consonance with the former testimony on the proceedings of June 6, 1946.

It would seem unnecessary to dilate upon, or otherwise give particular attention to, the several grounds urged, for they are in the main unsubstantial and fully answered by the Federal Statutes applicable: 28 U.S.C.A. 411, 412, et seq.

It is evident from a reading of the transcript of the foregoing proceedings, and from the excerpt hereinabove set forth, that strict compliance was given to the decision, mandate and direction of the Supreme Court, i. e.—*that daily wage earners be included in the panel.*

However, I will discuss plaintiff's points, seriatim:

(1 and 2) Both the Clerk and the Jury Commissioner emphasized in their testimony that the daily wage earners had not been excluded. On the contrary appropriate provision was made for this group.

Mr. Mikulich, the Jury Commissioner, in interpreting the groups classified under business, as compared with labor, detailed that the former included those connected with business as department heads, clerks, salesmen and solicitors, and their wives. In short, the business group representing approximately 50% of the panel did not

comprise all proprietors, managers and officials.

Mr. Calbreath, the Clerk of the Court, in his examination was very clear to point out that he sought to *equalize occupations*. Admittedly, he did not go to the San Francisco Chamber of Commerce for information, and this was not incumbent upon him. Plaintiff attempted in Exhibit No. 1 (Economic Survey, San Francisco Bay Area, 1945) to demonstrate that 11.14% of the population represented proprietors, managers and officials, and therefore it was argued that the total number of jurors drawn or "selected" from said group was disproportionate. Counsel for plaintiff has misconceived or misinterpreted the figures. According to the survey it appears: "San Francisco ranks high among large cities with nearly 55% of its entire resident population in the labor force." The other 45% necessarily represented proprietors, managers, officials, clerical, sales, kindred workers and others not identified with the laboring groups.

Although the Clerk and the Commissioner testified that this statistical data was not available to them when the names were selected for the panel, nevertheless the evidence demonstrates that the names as drawn by them represented an impartial panel from a cross-section of the community. The Clerk testified: *"I endeavored each time to select approximately half of the proposed jurors from the working class; by that I mean I made no distinction between those working for a daily wage as against those who worked for a weekly or monthly wage."*

Plaintiff is laboring under a serious misconception in declaring that "in the Superior Court of the State of California, whose jury qualifications control here, an equal percentage of men and women are now selected." Citing

Pointer v. United States, 151 U.S. 396, 405-409, 14 S. Ct. 410, 38 L. Ed. 208; *United States v. Roemig,* 52 F. Supp. 857.

The *Pointer* case is not authority for the proposition that the United States Disrict Courts are controlled by the procedure, rules or practices of the State courts. It is only in connection with the *qualifications* and *exemptions* of jurors to serve in the courts of the United States that the statutes of the State are at all applicable. The Court therein said:

> "There is nothing in these provisions sustaining the objection made to the mode in which the trial jury was formed. In respect to the qualifications and exemptions of jurors to serve in the courts of the United States, the state laws are controlling. But congress has not made the laws and usages relating to the designation and impaneling of jurors in the respective state courts applicable to the courts of the United States, except as the latter shall by general standing rule or by special order in a particular case adopt the state practice in that regard. U. S. v. Shackleford, 18 How. 588; U. S. v. Richardson, 28 Fed. 61, 69. In the absence of such a rule or order (and no such rule or order appears to have been made by the court below), the mode of designating and impaneling jurors for the trial of cases in the courts of the United States is within the control of those courts, subject only to the restrictions congress has prescribed, and also to such limitations as are recognized by the settled principles of criminal law to be essential in securing impartial juries for the trial of offenses." (151 U.S. 396, 14 S. Ct. 410 at 414.)

In *Albizu v. United States,* 88 Fed.(2d) 138, 140, the Court said:

"As to the assignment of errors relating to the selection of the Jury, there is only one act of congress relating to the drawing of jurors in the federal courts which requires that the persons who are summoned as jurors must be drawn publicly from a box containing at least 300 names. Other than this, unless a federal court shall, by order, adopt the state practice, the method of selection is within the control of the federal courts, subject to any limitation placed thereon by congress, or recognized by the settled principles of criminal law essential to securing an impartial jury. *Pointer v. United States,* 151 U.S. 396, 405-509, 14 S. Ct. 410, 38 L. Ed. 208."

The District Courts for the Northern District of California have not, by rule or order, adopted the State practice in this connection.

Reference is made by the moving party to *United States v. Roemig,* 52 F. Supp. 857. The specifications of invalidity therein made was that women were intentionally and systematically excluded from membership on a grand jury. The Court, although acknowledging that "nothing in the Constitution or Statutes of the United States peremptorily requires the inclusion of women on jury lists in the federal courts or forbids their exclusion," granted the motion to quash the indictment after a review of the authorities including *dictum* in *Glasser v. United States,* 315 U.S. 60, 62 S. Ct. 457, and *contra, United States v. Ballard* (D.C.S.D. Cal.) 35 F. Supp. 105; affirmed 152 Fed.(2d) 941, (9th Circuit); certiorari granted 66 S. Ct. 816.

The rule announced in the *Roemig* case was simply to the effect that a grand jury on which women were systematically and intentionally prevented from serving by manner of selecting members was invalidly constituted.

There is no rule, statute or decision requiring that the jury list or panel be composed or constituted of 50% women and 50% men.

It appears from the testimony of both the Clerk and the Commissioner herein that they "*endeavored to obtain 50% men and 50% women.*"

Many prospective women jurors after their names are drawn submit adequate reasons for their excusal by the District Judge, which necessarily involves an exercise of judicial discretion. This latter procedure obviously is not integrated with the drawing of the jurors in the first instance by the Clerk and the Commissioner. The fact that ultimately there were more men than women on the panel is immaterial.

(3) Ground 3 turns on the construction of Judicial Code, section 277 (28 U.S.C.A. 413). The statute is explicit. "Jurors shall be returned from such parts of the district * * * as the Court shall direct * * * so as not to incur an unnecessary expense, or unduly burden the citizens of any part of the District."

It is contended that "no court orders or directions had been given to the Jury Commissioner or the Clerk directing the parts of the district from which the jurors shall be returned." The Judges were not required to prescribe such directions or orders and no apportionment was required. It is discretionary with the Court to give or not, at its pleasure, any direction as to the summoning a jury from a part of a district. The Court can "draw and summon jurors from the entire district" but "it was not necessary, however, that this be done." *Lewis v. United States,* 279 U.S. 63, 72, 73 L. Ed. 615, 619; *Agnew v.*

United States, 165 U.S. 36, 42, 41 L. Ed. 624, 626; *Ruthenberg v. United States,* 245 U.S. 480, 482, 62 L. Ed. 414, 418.

Selection of jurors to sit in San Francisco was limited to those within convenient travel distance. It appeared that it was the rule and practice of the court, going back to 1912, to restrict names put in the jury box to those of people who lived within commuting distance of the court, but within that area, there was no discrimination against any locality.

That practice was maintained and approved under the *direction* of the Court at the hearing "In re selection of Master Trial and Grand Jury Venire on June 6, 1946, for the July 1946 Term of Court," before District Judges Louis E. Goodman and Michael J. Roche.

(4) The Judges of the District Court were not required to prescribe rules for the guidance of the Clerk and Commissioner. Congress has promulgated the rules and the statutes are clear and explicit. 28 U.S.C.A., Sec. 411, 412, et seq. The machinery for putting names into a jury box which shall contain not less than 300 names from which the panel shall be drawn by lot, has been directly prescribed by Congress. The names are to be placed in a box by the Clerk of the District Court, and a Commissioner to be appointed by the Senior District Judge. 28 U.S.C.A., Sec. 412.

Under the Federal statutes the preparation of the jury list is a non-delegable duty of the Clerk (or his deputy) and the Jury Commissioner. This duty calls for the exercise of judgment. They necessarily have committed to them a discretion in making selection of names from which

to draw. In *Glasser v. United States,* 315 U.S. 60, 85; 86 L. Ed. 680, 707, the Court said:

> "Jurors in a federal court are to have the qualifications of those in the highest court in the state, and they are to be selected by the clerk of the court and a jury commissioner. Judicial Code, Secs. 275, 276, 28 U.S.C.A., Secs. 411, 412. This duty of selection may not be delegated."

All that is called for on their part is an honest and unbiased effort to obtain a jury list from which no class has been purposefully and systematically excluded because of class prejudice.

In the instant case the Clerk and Jury Commissioner discharged their statutory functions impartially, according to law and in the exercise of a sound discretion.

(5) The contention that the "decision of the Supreme Court had not been complied with" is entirely without merit. The testimony of the Clerk and Jury Commissioner is clear and convincing that the jurors were impartially selected and drawn and represented a cross-section of the community. Further, that there was no systematic or intentional exclusion of any group, particularly those engaged in working for a daily wage. *Thiel v. Southern Pacific Co.,* 66 S. Ct. 984, 986.

(6) The asserted ground that a "majority of the persons selected were prejudiced in favor of the defendant Company" is equally without merit. There is no evidence that the persons whose names were selected and placed in the box by the Clerk and Jury Commissioner, were biased or otherwise prejudiced.

Counsel for the movant cannot supply evidence by the mere assertion of reckless charges and unfounded supposi-

tion. The burden of proof rests upon him and must be supported by competent evidence. It is the settled rule that all necessary prerequisites to the validity of official action are presumed to be complied with and where the contrary is asserted it must be affirmatively shown. *Lewis v. United States,* 279 U.S. 63, 73 L. Ed. 615, 619.

(7) There is no evidence before this Court that the Jury Commissioner and Clerk sought "jurors of the highest or superior intelligence and not those of 'ordinary intelligence'."

It appears that these officials acted honestly, impartially and without bias in processing and selecting the names which eventuated in the jury list; in so doing they were guided by the statutes, Federal and State, as applicable, under the direction of the District Court.

Jury lists are not conceived out of thin air. The non-delegable duty of preparing them rests with the Clerk and Commissioner. The evidence adduced at the hearing before this Court points unerringly to a painstaking effort on their part to discharge their official obligation.

An allegation of discriminatory practice in selecting a jury panel challenges an essential element of proper judicial procedure—the requirement of *fairness* on the part of the judicial arm of the Government. It cannot be lightly concluded that officers of the courts disregard this accepted standard of justice. *Akins v. Texas,* 325 U.S. 398; 65 S. Ct. Rep. 1276, 1278, 1279.

(8) Specifications or ground 8 is answered by reference to the statutes alluded to. Congress has outlined a specific procedure which was carried out in the selection and drawing of the jury panel under attack.

For the foregoing reasons, it is hereby ORDERED that: Plaintiff's motion to strike and quash the entire jury panel for the July. 1946 Term; for an order directing the Clerk and Jury Commissioner to select a new panel; for an order directing the parts of the District from which jurors shall be returned be, and the same is hereby denied.

Dated: August 28, 1946.

GEORGE B. HARRIS
United States District Judge.